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NO. _____

# IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, Superintendent,
Washington State Penitentiary,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTIONS PRESENTED

In a murder case, three teenagers claimed to have seen the victim between the time of her disappearance and the discovery of her body. Defense counsel made a conscious, informed decision not to call the teenagers as witnesses because of inconsistencies in their stories and to preserve counsel's credibility before the jury. The decision was made based on the written reports of two defense investigators and discussions between counsel and the second defense investigator. Defense counsel did not personally interview the teenagers. This case presents two questions related to a claim of ineffective assistance of counsel:

1. Whether counsel's decision not to have the teenagers testify was entitled to less deference, and constituted ineffective representation that undermined the adversarial process, solely because counsel did not personally interview the teenagers.

2. Whether the possibility the teenagers' testimony would have led to Respondent's acquittal meets the prejudice component of an ineffective assistance claim, which requires the defendant to show a reasonable probability that, but for the unprofessional errors, the proceedings would have been different.

## PARTIES

The Petitioner is John Lambert, who succeeded Tana Wood as the Superintendent of the Washington State Penitentiary. The Respondent is Brian Keith Lord.

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## PETITION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 184 F.3d 1083 (9th Cir. 1999) (App. 1a-30a). The opinion of the District Court for the Western District of Washington is unpublished (App. 33a-121a). The opinion of the Washington Supreme Court is reported at 117 Wash. 2d 829, 822 P.2d 177 (1991) (App. 122a-324a).

## JURISDICTION

The court of appeals entered judgment on July 14, 1999 (App. 1a), and denied a timely petition for rehearing on September 23, 1999. (App. 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATEMENT

This case concerns Respondent's claim that trial counsel's informed, conscious decision not to call three witnesses was ineffective assistance because counsel did not personally interview the witnesses, but instead relied on interviews conducted by two defense investigators. The case raises issues concerning the measure of deference a court must apply to counsel's decision not to personally interview and call a witness, and the proper standard for determining whether counsel's decision prejudiced the defense.

### A. The State's Case Against Lord

Tracy Parker disappeared on September 16, 1986. Police discovered her body two weeks later. Respondent Brian Keith Lord was arrested and charged with Tracy's murder.

The Washington Supreme Court described Lord's case as "surely one of the most complex ever tried in this state." *State v. Lord*, 117 Wash. 2d 829, 916, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992) (App. 272a). The trial lasted 37 days, approximately 100 witnesses testified, and experts testified on all or part of 18 days, demonstrating the "unusual complexity of the scientific evidence in this case." *Id.* at 857. There were almost 9,000 pages of transcripts, more than 700 pages of clerks papers, and approximately 200 exhibits.

The prosecution presented extensive scientific evidence tying Lord to the murder, including over 100 pieces of trace evidence. *State v. Lord*, 117 Wash. 2d at 843. Among other things, Lord's red towel was found with Tracy's clothing, stained with Tracy's blood type. *Id.* An orange U-Haul blanket Lord admitted having contact with was stained with a unique

enzyme, present in Tracy's blood, that is found in only 9 percent of the white population. *Id.* Although DNA evidence was not available at the time of trial, post-trial DNA testing by defense experts was not exculpatory. *See In re the Personal Restraint Petition of Lord*, 123 Wash. 2d 296, 320, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Telephone records placed Tracy and Lord at the same house within minutes of each other the night of the murder. *Lord*, 117 Wn.2d at 838-39. The prosecution presented evidence of Lord's bizarre behavior the night of the murder, as well as his attempts to suborn perjury. *Id.* at 839-41 and 847-48. Finally, the prosecution presented Lord's detailed confessions to the murder. *Id.* at 848.

Lord was convicted and sentenced to death for the aggravated first-degree murder of Tracy Parker. The Washington Supreme Court affirmed the conviction and sentence on direct appeal, and the court denied Lord's post-conviction, collateral challenge. *State v. Lord*, 117 Wash. 2d at 916 (App. 272a); *In re the Personal Restraint Petition of Lord*, 123 Wash. 2d at 332-33. A complete summary of the facts of the murder and the evidence presented at trial may be found at *State v. Lord*, 117 Wash. 2d at 838-49 (App. 141a-162a).

### B. Federal Habeas Corpus Proceedings

Lord filed his habeas corpus petition in 1994. Among his 58 claims, Lord alleged ineffective assistance based on counsel's failure to call the three teenagers as witnesses. Prior to the discovery of her body, numerous people reported sightings of Tracy to the police. Among those were three teenage boys who reported that they had glimpsed Tracy walking as they drove down a road. The boys claimed the sighting occurred on September 17, 1986, the day after Tracy disappeared.

Lord's original defense counsel received copies of the reports on the police interviews of the teenagers, and counsel hired an investigator to interview them. The investigator

provided reports of the interviews to counsel. (App. 346a-347a). Lord's original counsel withdrew prior to trial, and the court appointed Ronald Ness and Judith Mandel to represent Lord.[1] Mr. Ness and Ms. Mandel reviewed the work product of Lord's prior counsel, and retained a second defense investigator to re-interview the boys. The second investigator also provided written reports of the interview to counsel. (App. 343a-345a and 348a-349a). After reviewing the various reports and discussing the matter with the second investigator, Mr. Ness and Ms. Mandel decided not to personally interview the teenagers or to call them as witnesses.

The district court conducted an evidentiary hearing on Lord's claim. The evidentiary hearing showed that Mr. Ness and Ms. Mandel hired Mr. Zornes, an experienced defense investigator, to re-interview the teenagers. (App. 337a). After Mr. Zornes reported back, counsel determined "the three individuals were not very positive in either identification or timing." (App. 337a).

Robert Huff "could not recall the exact date of the sighting, nor the day of the week". (App. 343a). Paul Holden and Greg Ayers "when pressed about the exact day they would at times waver." (App. 348a). "Holden said that he and ROBERT HUFF, JR. had gone clam digging on either Monday or Tuesday of the week beginning September 15, 1986, and that Greg Ayers joined them on the second day, which would have been either Tuesday or Wednesday." (App. 348a). Holden admitted "he did

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[1] At the time, Mr. Ness had 14 years experience as a criminal defense attorney, and he had tried one prior capital case. Ms. Mandel had extensive criminal law experience, as both a prosecutor and a defense attorney. The Washington Association of Criminal Defense Lawyers honored Ms. Mandel for her work on Lord's case with the William O. Douglas Award, which is given to an attorney demonstrating high levels of dedication and accomplishment in criminal defense. Counsel were aided by a jury selection expert, medical experts and forensic experts.

not get a good look at Parker," and "he could not testify that he was 100% factually certain that it was Tracy as he had only a five second glance at the girl." (App. 346a and 349a).[2]

There was no independent evidence supporting the boys' claim that Tracy was alive on Wednesday, September 17, 1986. There was no evidence explaining why, if Tracy had not been kidnapped and murdered on Tuesday night, she did not go home after telling her friend that "she had to 'hurry and get home before her mom got home'", and that she was going to "'go straight home.'" *Lord*, 117 Wash. 2d at 838. There was also no independent evidence explaining why, if Tracy had not been kidnapped and murdered on Tuesday night, she did not go to school on Wednesday. *Id.* at 885. The fact that Tracy did not go home as she intended and did not go to school the next day indicated Tracy was no longer acting on her own free will. That evidence discredited the boys' claim they had seen her ***alone*** on Wednesday.

Mr. Ness and Ms. Mandel consciously decided not to call the teenagers as witnesses. (App. 338a). Mr. Ness did not believe the teenagers would have been supportive of the defense pursued at trial. (App. 328a). Mr. Ness testified that "[i]n terms of whether or not they were beneficial, our decision was that they probably were not." (App. 328a). Mr. Ness explained, "we felt it would affect our credibility with the jury because of the nature of what we had discovered in terms of their interviews with our investigator and, I believe, with the police." (App. 338a). "We did not believe that they were accurate. And we were concerned about our credibility with the jury in presenting testimony that

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[2] The fact the teenagers did not see Tracy's family and the scores of volunteers searching for her on Wednesday suggests that, if the sighting occurred at all, it occurred on Tuesday. Even if the sighting did occur on Wednesday, the boys might have seen Tracy's sister, Shannon Parker, who resembled Tracy and who had been searching the area on the date of the alleged sighting.

may not have been beneficial." (App. 330a). "[W]e didn't feel that they were going to be beneficial and may have affected what we thought would be our credibility to the jury." (App. 330a).

Ms. Mandel testified that, after Mr. Zornes had outlined the interviews, they decided not to pursue the evidence because "we had concerns about their credibility and therefore about our credibility." (App. 341a). Ms. Mandel said the teenagers, and the other people who claimed to have seen Tracy, "all fell into the category of testimony that we, we decided we did not want to present." (App. 342a).

Following the evidentiary hearing, the Honorable Barbara J. Rothstein, United States District Judge, ruled the decision not to use the testimony of the teenagers did not constitute ineffective assistance of counsel. The district court concluded:

> Having carefully reviewed all of the documentary evidence submitted on this claim and having heard the testimony of the three witnesses as well as the opinion of Lord's expert witness, ***the court concludes that the decision not to call them was a reasonable strategic choice which did not amount to ineffective assistance of counsel.*** Defense counsel reasonably could have found sufficient discrepancy among the witnesses' various accounts, sufficient uncertainty in their memories and sufficient question about the accuracy of their identification as well as the date on which the event happened to decide not to call them as witnesses. Defense counsel could also reasonably have been concerned that these discrepancies and inconsistencies together with facts concerning the witnesses' drinking and drug usage might reflect poorly on the defense.

(App. 88a-89a) (emphasis added).

The district court denied Lord's guilt phase claims, but vacated the death sentence on a different ground. (App. 33a-121a). Both the State and Lord appealed.

The Ninth Circuit issued its opinion on July 14, 1999, reversing the order denying Lord's ineffective assistance claim. The court found counsel ineffective in the guilt phase by not calling the teenagers as witnesses. Recognizing that an attorney is not required to interview every witness, the Ninth Circuit nevertheless held that an attorney's decision not to call a witness made upon a review of an investigator's reports "will be entitled to less deference than if he interviews the witness." *Lord*, 184 F.3d at 1095 n. 8. The Ninth Circuit further held that an attorney cannot make a professional judgment about whether to call a witness "without looking him in the eye and hearing him tell his story." *Id.* at 1095. The court did not reach Lord's remaining claims, and the court dismissed the State's appeal as moot. The court of appeals denied the State's timely petition for rehearing en banc on September 23, 1999. (App. 31a-32a).

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit misapplied the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), for evaluating a claim of ineffective assistance of counsel. The Court should grant this petition because the Ninth Circuit's decision conflicts with the decisions of other courts of appeals applying the *Strickland* standard.

### A. Components of a Claim of Ineffective Assistance of Counsel.

The Sixth Amendment recognizes the right to effective assistance of counsel. A claim of ineffective assistance of counsel has two components. First, the defendant must show that "counsel made errors so serious that counsel was not functioning

as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* Thus, a federal court "***must indulge a presumption that counsel's conduct falls within the wide range of reasonable professional assistance*** . . . ." *Id.* (emphasis added). The defendant bears the difficult burden of overcoming the presumption that counsel's action or omission was "sound trial strategy". *Id.* This burden is highly demanding, as the defendant must prove he was denied a fair trial by the gross incompetence of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986).

To function as "counsel" guaranteed by the Sixth Amendment, a defense attorney must "require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). "When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred." *Id.*

To make the adversarial testing process work, counsel owes a duty to investigate. *Strickland*, 466 U.S. at 690. However, there are countless ways an attorney may fulfill the duty to investigate. *Id.* Consequently, the reviewing court must strongly presume that counsel made all significant decisions regarding a investigation in the exercise of reasonable professional judgment. *Id.* As this Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

> investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. ***In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.***

*Strickland*, 466 U.S. at 690-91 (emphasis added); *see also Kimmelman v. Morrison*, 477 U.S. at 384.

The second component of an ineffective assistance claim is that the "defendant must show the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To meet this standard, the defendant "***must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.***" *Id.* at 694 (emphasis added).

The Ninth Circuit's decision misapplies both of these components. The court refused to grant the required deference to trial counsel's decision not to call the teenagers as witnesses because trial counsel did not personally interview them. The court also did not determine there was a "***reasonable probability***" that the result would have been different as required by *Strickland*. Instead, the Ninth Circuit based its decision on "***the possibility*** that [the teenagers'] testimony would have led to Lord's acquittal. . . ." *Lord*, 184 F.3d at 1095-96 (emphasis added).

In both of these conclusions, the Ninth Circuit's decision is inconsistent with *Strickland* and conflicts with the decisions of other courts of appeals.

## B. The Ninth Circuit Standard Of "Less Deference" Conflicts With The Standard Applied By The Third, Fourth, Seventh, Eighth, Tenth And Eleventh Circuits.

In this case, defense counsel thoroughly investigated the teenagers' story. The teenagers were interviewed by two defense investigators. The Ninth Circuit admitted it would have deferred to counsel's judgment "if they had made the decision not to present the three witnesses after interviewing them in person." *Lord*, 184 F.3d at 1095.[3] However, without any supporting authority, the Ninth Circuit declares "counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story." *Id.* The court held the decision not to call a witness, if based upon a review of an investigator's reports, "will be entitled to less deference than if he interviews the witness." *Id.* at 1095 n. 8.

This holding is inconsistent with *Strickland* and directly conflicts with the other circuit courts' application of *Strickland's* mandate that, in reviewing any decision not to investigate, the court must apply "a heavy measure of deference to counsel's judgment." *Strickland*, 466 U.S. at 691. In *Strickland*, this Court was highly deferential to trial counsel's decision not to use the testimony of character witnesses. *Id.* at 699. Yet in *Strickland*, trial counsel did not personally interview potential character witnesses. Indeed, the trial counsel in *Strickland* did not even

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[3] The Seventh, Eighth and Eleventh Circuits agree the decision not to call a witness is the epitome of a strategic decision that the courts will seldom second guess. *See Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.) (*en banc*), *cert. denied*, 516 U.S. 856 (1995); *Walls v. Bowersox*, 151 F.3d 827, 834 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1468 (1999). "It would be a rare case where counsel's conscious decision not to call a witness would amount to constitutionally ineffective assistance." *United States v. Weaver*, 882 F.2d 1128, 1139 (7th Cir.), *cert. denied*, 493 U.S. 968 (1989).

have an investigator interview and evaluate potential character witnesses. Nevertheless, this Court concluded that "even without application of the presumption of adequate performance . . . trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Id.*

The Eleventh Circuit has "rejected the position that strategic decisions can be considered reasonable only if they are preceded by a 'thorough investigation.'" *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999). The Eleventh Circuit refused to adopt a per se rule that required an attorney to personally interview potential defense witnesses. *Id.* (rejecting position that counsel must interview all of the defendant's family members). The Eleventh Circuit found such a rule would conflict with *Strickland's* declaration that "'[t]here are countless ways to provide effective assistance of counsel in any given case. . . .'" *Id.* at 1237 (quoting *Strickland*, 466 U.S. at 689-90). "By its nature, 'strategy' can include a decision not to investigate." *Williams*, 185 F.3d at 1237 (citing *Rogers v. Zant*, 13 F.3d 384, 387 (11th Cir.), *cert. denied*, 513 U.S. 1036 (1994)). Consequently, "[a] decision to limit investigation is accorded a strong presumption of reasonableness." *Williams*, 185 F.3d at 1237 (quoting *Mills v. Singletary*, 63 F.3d 999, 1021 (11th Cir. 1995), *cert. denied*, 517 U.S. 1214 (1996)).[4]

The Third Circuit applies a similar standard. In assessing counsel's decision not to personally interview and call a potential defense witness, the federal courts "'must apply[ ] a heavy measure of deference to counsel's judgments.'" *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113 (3rd Cir. 1990) (quoting *Strickland*, 466 U.S. at 691). In *Mazurkiewicz*, counsel decided

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[4] The Sixth Circuit has gone as far as to hold that "a defendant is not denied effective assistance of counsel even if his attorney conducts no independent investigation of his own but merely receives and relies upon a prior attorney's work product in going to trial." *Ray v. Rose*, 535 F.2d 966, 975 (6th Cir.), *cert. denied*, 429 U.S. 1026 (1976).

not to call a potential self-defense witness based upon the judgment that the defense would not succeed. *Id.* at 111. Counsel reached this judgment, knowing the substance of the witness' expected testimony, but without personally interviewing the witness. *Id.* The Third Circuit found counsel's decision reasonable. "As *Strickland* made clear, trial counsel was not bound by an inflexible constitutional command to interview every possible witness." *Id.* at 113. Counsel must simply exercise reasonable professional judgment in deciding whether to interview the potential witness. *Id.* Contrary to the Ninth Circuit, the Third Circuit held that in reviewing this judgment, the court must apply a heavy measure of deference. *Id.*

The Eighth Circuit also grants deference to trial counsel's judgment even when trial counsel does not personally interview witnesses. "Only rarely" has counsel's failure to interview potential witnesses sufficed to warrant a finding of ineffective assistance. *Plant v. Wyrick*, 636 F.2d 188, 189 (8th Cir. 1980). An attorney's professional judgment may lead him or her to decline to interview some witnesses and to rely on other sources. *Id.* at 189-90. "Such an exercise of professional judgment will be given the same deference as any other." *Id.* at 190 (quoting *Thomas v. Wyrick*, 535 F.2d 407, 413 n. 7 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976)).

In *Wing v. Sargent*, 940 F.2d 1189, 1190 (8th Cir. 1991), counsel did not interview potential defense witnesses. "Wing's counsel testified that he knew these witnesses and the substances of their potential trial testimony – that Gates had told them that Pratt, not Wing, was the second burglar." *Id.* at 1191. Even though counsel did not personally interview the witnesses, the Eighth Circuit applied a heavy measure of deference to the decision not to call them at trial. *Id.*

In *Sanders v. Trickey*, 875 F.2d 205 (8th Cir.), *cert. denied*, 493 U.S. 898 (1989), Sanders alleged counsel was ineffective for not interviewing and calling a witness who would

have testified that Sanders did not participate in the crime. Like Lord, Sanders argued the lack of an interview rendered the decision unreasonable. *Id.* at 208-09. Rejecting this claim, the Eighth Circuit first noted there is no per se rule that failure to interview witnesses constitutes ineffective assistance. *Id.* at 209. The court then held that counsel "cannot be said to have been ineffective because she failed to interview a witness she had little reason to believe would be useful or helpful." *Id.* at 210.; *see also Schlup v. Armontrout*, 941 F.2d 631, 639 (8th Cir. 1991) (counsel may reasonably decide not to call alibi witness based on review of witness' prior statements), *cert. denied*, 503 U.S. 909 (1992).

The Seventh Circuit has also applied a heavy measure of deference to the decision not to personally interview a witness. In *Lewis v. Lane*, 832 F.2d 1446, 1462 (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988), Lewis alleged counsel failed to personally interview potential alibi witnesses. The Seventh Circuit held Lewis' Illinois attorney acted reasonably by relying on interviews conducted by an Iowa attorney:

> Mr. Kinser and defense counsel for Bernice together contacted an attorney in Des Moines who interviewed the witnesses there. ***That attorney told Mr. Kinser that it was her opinion that the witnesses were not credible and that they would lie on the stand to protect petitioner*** and Bernice. Bernice and her counsel decided not to have these alibi witnesses testify because the jury would quickly perceive that they were lying and that that would do far more damage to Bernice's case than the absence of contrary evidence. ***Mr. Kinser was equally justified in reaching that same strategic judgment on behalf of petitioner.*** . . .

*Lewis*, 832 F.2d at 1462 (emphasis added).

The Fourth and Tenth Circuits also grant the same deference, even if trial counsel does not interview witnesses. The Sixth Amendment "does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony." *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir.), *cert. denied*, 119 S. Ct. 444 (1998). If counsel generally knew the substance of a witness' statements, counsel could make a reasonable tactical decision not to personally interview or call the witness. *Huffington*, 140 F.3d at 580-81; *Wing v. Sargent*, 940 F.2d at 1191. "An attorney's decision not to interview witnesses and to rely on other sources of information, if made in the exercise of professional judgment, is not ineffective counsel." *United States v. Glick*, 710 F.2d 639, 644 (10th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); *see also United States v. Snyder*, 787 F.2d 1429, 1433 (10th Cir.), *cert. denied*, 479 U.S. 836 (1986).

Thus, unlike the Ninth Circuit, other circuits that have considered this question do not give less deference to trial counsel's decisions on witness selection simply because trial counsel did not personally interview witnesses. This majority view represents an important practical approach to the effective defense of a criminal case.

In most cases, preparing for trial will include consultation between attorney and client, interviews with important witnesses, and investigation of potentially fruitful defenses. *United States v. Weaver*, 882 F.2d at 1138 (citing *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983)). "If defense counsel is unable to personally complete these tasks, then counsel must seek the aid of others, including experts and investigators, to assist in the preparation and investigation." *Weaver*, 882 F.2d at 1138; *see also United States v. Shetterly*, 971 F.2d 67, 74 (7th Cir. 1992).[5]

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[5] The American Bar Association recognizes that requiring counsel, rather than a defense investigator, to conduct personal interviews imposes an

Consequently, unlike the Ninth Circuit, the other circuit courts believe counsel acts reasonably by relying on investigators to interview potential witnesses:

> ***[I]t is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally.*** *See Harris v. Dugger*, 874 F.2d 756, 762 & n. 8 (11th Cir. 1989). ***In fact, we have criticized counsel in other cases for failing to utilize subordinates to conduct pre-trial investigation.*** *See Henderson v. Sargent*, 926 F.2d 706, 714 (8th Cir. 1991).

*Walls v. Bowersox*, 151 F.3d at 834 n. 4 (emphasis added).

In reviewing counsel's performance, the courts "'must appreciate the practical limitations and tactical decisions that trial counsel face. . . .'" *Huffington*, 140 F.3d at 581 (citations omitted). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689. Imposing a detailed set of rules for counsel to follow "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*

The Ninth Circuit departs from this practical rule and essentially requires trial counsel to personally interview witnesses not called to trial. Attorneys often decide during the course of a trial whether to call a particular witness. It is not always possible or wise for counsel to personally interview all

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inordinate drain on defense counsel's resources. ABA Standards for Criminal Justice § 5-1.4.

witnesses prior to trial.[6] Under the Ninth Circuit standard, however, if counsel has not interviewed a witness prior to trial, counsel must either call the witness at trial or conduct an interview during trial. Trial judges will find it peculiar when counsel asks for a recess in order to interview witnesses whom counsel does not intend to call.

The conflict between the Ninth Circuit and the other circuit courts is significant. The reason "[j]udicial scrutiny of counsel's performance must be high deferential" is to avoid second guessing by defendant or the reviewing court. *Strickland*, 466 U.S. at 689. By granting less deference to trial counsel who does not interview each witness not called to testify, the Ninth Circuit's decision provides a license for a reviewing court to second guess trial counsel. That is exactly what happened in this case. The trial of Lord was a hard fought case in which the adversarial process functioned properly. However, since Lord was convicted, the Ninth Circuit concludes that another strategy might have worked better.

### C. The Ninth Circuit's Possibility Standard of Prejudice Conflicts With The Fifth And Eighth Circuits' Reasonable Probability Standard Of Prejudice.

The second component of a claim of ineffective assistance of counsel is that the defendant "must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. "The defendant must show that there is a ***reasonable probability*** that, but for counsel's unprofessional

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[6] For example, during the course of Lord's trial, counsel were busy discovering and developing evidence to rebut the State's extensive scientific evidence. Counsel were not oblivious to, and did not fail to investigate, the teenagers' statements. Counsel simply made the conscious decision to have the defense investigator re-interview the teenagers, thus allowing counsel to focus their attention on the scientific aspect of the trial.

errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The petitioner must prove counsel's performance prejudiced the defense so "as to deprive the defendant of a fair trial, a trial whose result is unreliable." *Strickland*, 466 U.S. at 687; *see also Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). This standard requires more than a possibility that the evidence might have produced a different result. *Strickler v. Greene*, 119 S. Ct. 1936, 1953 (1999). Rather, the "petitioner's burden is to establish a reasonable ***probability*** of a different result." *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (emphasis in original).

Instead of a "***reasonable probability***", the Ninth Circuit found "***the possibility*** that [the teenagers'] testimony would have led to Lord's acquittal to be 'sufficient to undermine confidence in the outcome.'" *Lord*, 184 F.3d at 1095-96 (emphasis added) (quoting *Strickland*, 466 U.S. at 694). The court compounded this error by applying a harmless error analysis rather than determining if a constitutional error in fact occurred. *Cf. Calderon v. Coleman*, 525 U.S. 141 (1998) (recognizing distinction between analysis for determining constitutional error and analysis for determining whether error is harmless); *Kyles v. Whitley*, 514 U.S. at 436 (noting the test for prejudice adopted in *Strickland* would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under the harmless error standard of *Kotteakos v. United States*, 328 U.S. 750 (1946)).

The court noted that if the teenagers had testified, the State might still have won a conviction. *Lord*, 184 F.3d at 1096. However, the court added, "we find ourselves 'in grave doubt as to the harmlessness of an error that affects substantial rights,' and must conclude that counsel's omission of this evidence prejudiced Lord's defense." *Id.* (quoting *O'Neal v. McAninch*,

513 U.S. 432, 445 (1995)).[7] Because the Ninth Circuit was unsure if the testimony might possibly have affected the jury's verdict, the court assumed it must find prejudice. By combining the possibility of prejudice standard with the harmless error analysis, the Ninth Circuit did not require Lord to affirmatively prove prejudice. The Ninth Circuit applied too lenient a standard, effectively relieving Lord of his burden of proof on the second prong of the *Strickland* standard.

The Ninth Circuit's more lenient standard of prejudice is inconsistent with *Strickland* which requires a defendant show a "reasonable probability". The Ninth Circuit's decision also conflicts with the standard applied by other circuits. The Fifth Circuit requires the petitioner to "show a '***reasonable probability***' that the jury would have otherwise harbored a reasonable doubt concerning guilt." *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997) (emphasis added), *cert. denied*, 118 S. Ct. 1567 (1998). In a case similar to Lord's, the Eighth Circuit held the district court erred by applying a harmless beyond a reasonable doubt standard in determining if counsel's performance prejudiced the defendant. *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992). The Eighth Circuit held the petitioner had the burden "to affirmatively prove that there is a ***reasonable probability*** that, had his trial counsel interviewed and called the alibi witnesses, he would have been acquitted." *Id.* (emphasis added).

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[7] The Ninth Circuit's conclusion on this point is particularly ironic. On one hand, the court faulted trial counsel for deciding not to call the teenage witnesses "without looking [them] in the eye and hearing [them] tell [their] story." *Lord*, 184 F.3d at 1095. On the other hand, the Ninth Circuit gave no deference to the conclusion of the district court judge who actually looked these witnesses in the eye and heard them testify at the evidentiary hearing. In doing so, the Ninth Circuit ignored the district court's implicit findings that the teenagers were not credible.

The Ninth Circuit did not find a reasonable ***probability*** that the teenagers' testimony would have led to Lord's acquittal. Rather, the Ninth Circuit merely found "the ***possibility*** that their testimony would have led to Lord's acquittal. . . ." *Lord*, 184 F.3d at 1095-96 (emphasis added). Absent this lenient standard, Lord could not succeed on his ineffective assistance claim. The prosecution's case against Lord was strong. *Lord*, 184 F.3d at 1088. Lord's confessions, bizarre behavior and attempts to influence testimony, coupled with the considerable forensic evidence tying Lord to the crime, were powerful evidence. *See Strickler*, 119 S. Ct. at 1954. In light of this evidence, Lord could not show more than a possibility of prejudice.

This was not a case where counsel failed to conduct any investigations or aggressively defend Lord. Rather, counsel pursued a defense they believed prudent, presented evidence in support of that defense, and aggressively attacked the State's case. Counsel required the prosecution's case to survive the crucible of meaningful adversarial testing. By reversing the conviction based upon a possibility of prejudice, the Ninth Circuit has established a rule which allows the federal courts to reverse a valid state court judgment based upon virtually any act or omission of counsel that might have had a conceivable effect on the outcome. *Strickland*, 466 U.S. at 693. The purpose of the *Strickland* standard is to ensure the proper operation of the adversarial process, not to second guess an unsuccessful defense strategy. The Ninth Circuit's decision is inconsistent with *Strickland*, and is in conflict with decisions of other circuit courts. This Court should grant the petition to resolve this conflict.

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## CONCLUSION

For the reasons stated herein the petition should be granted.

RESPECTFULLY SUBMITTED

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December 1999

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# IN THE SUPREME COURT OF THE UNITED STATES

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JOHN LAMBERT, Superintendent,
Washington State Penitentiary,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

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## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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December 1999

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| Brian Keith Lord,<br>*Petitioner-Appellee,*<br><br>v.<br><br>Tana Wood, Superintendent,<br>*Respondent-Appellant.* | No. 97-99025<br><br>D.C. No.<br>CV-94-00464-R |

| | |
|---|---|
| Brian Keith Lord,<br>*Petitioner-Appellant,*<br><br>v.<br><br>Tana Wood, Superintendent,<br>*Respondent-Appellee.* | No. 97-99026<br><br>D.C. No.<br>CV-94-00464-R<br><br>OPINION |

Appeals from the United States District Court
For the Western District of Washington
Barbara J. Rothstein, Chief Judge, Presiding

Argued and Submitted
November 19, 1998—San Francisco, California

Filed July 14, 1999

Before: James R. Browning, Alex Kozinski and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Kozinski

## SUMMARY

### Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of conviction. The court held that trial counsel's failure to call, or personally interview, three witnesses who claim to have seen the victim alive after the defendant is supposed to have killed her constitutes ineffective assistance of counsel

Appellee Brian Lord was charged with the murder of Tracy Parker. Parker disappeared on September 16, 1986.

Tracy's body was discovered on September 30th. She had been killed by a number of blows to the head from a blunt object and she had been raped.

Lord was arrested.

At trial, the prosecution theorized that Lord had taken Tracy to his brother's workshop where he struck her several times with a hammer or similar tool. He raped her in his pickup, then drove off with her body in the back. According to the prosecution, all of this occurred before 8:30. Before returning to his brother's house at 8:45, Lord dumped Tracy's body and took off his bloodstained shirt.

The State's case against Lord was strong, but it was largely circumstantial. The prosecution had no DNA evidence or witnesses to the murder, no one had seen Tracy and Lord together on the day she disappeared, none of the trace physical evidence presented at trial conclusively tied Lord to the crime, and much of the blood related evidence was tainted by the forensic investigator's mishandling of the tests and his subsequent attempts to cover up his mistakes. Nor was the State able to pinpoint the exact time of the murder.

Lord's defense attacked the reliability of the prosecution's evidence. He had no alibi and no alternative theory of how the murder might have been committed.

Paul Holden and Robert Huff, Jr. told a police investigator that they had been driving together with a third boy, Greg Ayers and had seen Tracy walking down the highway on September 17, a day after Lord allegedly murdered her. The boys remained adamant that they were correct and were sure that the girl they saw was Tracy and not her sister. They confirmed their stories when interviewed by police three days later. The most important elements of their stories remained consistent with each interview with police and defense investigators during the four-month period following Tracy's murder. The boys did not know or have any ties to Lord.

Lord's counsel did not personally interview the boys, and did not call them as witnesses at trial.

A jury found Lord guilty of aggravated first-degree murder. The judge sentenced him to death.

The Washington Supreme Court affirmed and the U.S. Supreme Court denied certiorari. After exhausting his state remedies, Lord filed a federal habeas petition. The district court granted the petition.

Lord argued that his trial counsel rendered ineffective assistance when they failed to call Holden, Huff, and Ayers as witnesses.

[1] The Sixth Amendment right to counsel guaranteed to criminal defendants is the right to the effective assistance of counsel. In an ineffective assistance of counsel claim, the petitioner must first establish that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Such an assessment is highly deferential to defense counsel's decisions at trial, with the attorney presumed to have rendered professionally adequate assistance. A petitioner may overcome this presumption only by demonstrating that the

identified acts or omissions were outside the wide range of professionally competent assistance.

[2] Even if petitioner shows that his lawyer's performance was deficient, he must still prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome.

[3] A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Lord's counsel's cursory investigation of the three possible alibi witnesses, and counsel's subsequent failure to put them on the stand, constituted deficient performance that was prejudicial to Lord's defense.

[4] Police and investigative reports on which trial counsel relied did not support their claim that the statements of Holden, Huff and Ayers were vague and/or inaccurate. Holden and Huff spoke to the police the day after they saw the girl they thought was Tracy, and again a few days later. The most important elements of the boys' statements remained consistent in each interview with police and defense investigators during the four-month period following Tracy's disappearance and murder: On September 17, 1986, they saw a girl they believed was Tracy, and were certain the girl was not Tracy's sister. Nor did any of the police or defense investigators conclude that the boys' statements were inaccurate. [5] The boys never expressed any significant doubt about the sighting.

[6] Trial counsel's failure to present their testimony was all the more questionable in light of the weaknesses in the prosecution's case against Lord. [7] The boys' mutually reinforcing statements were probably the strongest evidence of Lord's innocence that trial counsel could have offered. Three young men with no ties to Lord and with no reason to lie could have given Lord a formidable defense: The victim was seen walking around well after the time Lord was supposed to have killed her.

[8] Presenting the testimony of the boys would not have entailed significant costs in the defense strategy. Nor would the proffer of three witnesses, who were unrelated in any fashion to the defendant or the victim, have tainted Lord's attorneys.

[9] Counsel's judgment might have been shown deference if they had made the decision not to present the three witnesses after interviewing them in person. [10] However, counsel appeared to have made their decision to exclude the witnesses based on a misimpression that the police and investigators who spoke to the witnesses did not find them credible. A competent attorney would not have failed to put them on the stand.

[11] The possibility that their testimony would have led to Lord's acquittal was sufficient to undermine confidence in the outcome of the trial. Trial counsel's omission of this evidence prejudiced Lord's defense.

[12] Lord's trial counsel's performance fell outside the wide range of professionally competent assistance and there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

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## COUNSEL

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Peter A. Camiel, Mair, Camiel & Kovach, Seattle, Washington, for the petitioner-appellee-cross-appellant.

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## OPINION

**KOZINSKI**, Circuit Judge:

In this capital case we consider whether counsel's failure to call, or personally interview, three witnesses who claim to have seen the victim alive after petitioner is supposed to have killed her, constitutes ineffective assistance of counsel under *Stickland v. Washington*, 466 U.S. 668 (1984).

**Background**

On the afternoon of September 16, 1986, 16-year old Tracy Parker went out riding a horse belonging to her neighbors Wayne and Sharon Frye. Tracy visited some friends early that evening and, as she was leaving, informed one of them that she planned to return the horse to the Fryes' stable and then "go straight home." At about 8 p.m., Tracy called a friend from the Fryes' residence. When Sharon Frye came home between 8:20 and 8:30, she found the house empty.

Brian Keith Lord was a carpenter who was helping the Fryes remodel their house. The Fryes had told Lord where they kept an extra set of keys, so he could enter the house as he pleased. Lord had met Tracy through the Fryes and had on occasion given her rides home in his brother Kirk's pickup. At 7:44 on the evening of Tracy's disappearance, Lord called his apartment from the Fryes' residence to tell his girlfriend he would be late for a dinner party they were hosting that evening.

At about 8:45, Lord arrived at Kirk's house driving his brother's blue pickup. Don and Radwyn Carroll, Kirk's in-laws, were there when Lord pulled up. The Carrolls had returned from dinner at 8:30. Don testified that Lord drove up "pretty fast" to the workshop next to the house, and that the truck was "smoking and steaming." Don also noticed that Lord was shirtless even though it was only 58 degrees outside. From inside the house, Don saw Lord wash out the back of the pickup with a hose and remove from it an orange or beige blanket. When Don came out to speak to him, Lord said he was building a stereo cabinet in Kirk's workshop. Don asked to see it, but Lord said that he wanted his brother to see it before anyone else. Don did not enter the workshop that evening. Kirk arrived home at about 9 o'clock and talked to Lord in front of the workshop for a while, but Lord did not show him the cabinet and Kirk did not enter the workshop.

Lord arrived at his apartment at 10:15, several hours late for the dinner party. He was to have brought a dining table he was making, but showed up empty-handed. Lord went to the bathroom soon after his arrival and stayed there for some time, prompting some of his guests to leave. When Lord emerged from the bathroom, he acted somewhat strangely and two guests noticed that there was a fresh wound on his arm. Lord did not tell anyone where he had been that evening, but did say that he had been working late.

Tracy's clothing and a red towel were found near a dirt road during the weekend of September 20th, and an orange U-Haul blanket resembling the one Don Carroll had seen Lord remove from the truck turned up in a nearby construction area on September 22nd. Tracy's semi-nude body was discovered on September 30th, a fortnight after her disappearance. Lord was arrested that evening. The medical examiner subsequently determined that Tracy had been killed by a number of blows to the head from a blunt object. There was also evidence that she had been raped after being knocked unconscious.

The State's theory was that Lord offered Tracy a ride home from the Fryes' place sometime around 8 o'clock, but had taken her instead to Kirk's nearby home. No one was there when Lord and Tracy arrived a few minutes after 8, and Lord forced or lured Tracy into Kirk's workshop where he struck her several times about the head with a hammer or similar tool. He proceeded to rape her in his pickup, then drove off with her body in the back. According to the prosecution, all of this occurred before the Carrolls arrived at Kirk's home at 8:30. Before returning to Kirk's at 8:45, Lord dumped Tracy's body where it was subsequently found (about 3 miles from Kirk's home), and took off his bloodstained shirt.

The jury found Lord guilty of aggravated first-degree murder. After a special sentencing hearing (where the State was permitted to cross-examine Lord after his allocution), the jury determined that there were no mitigating circumstances sufficient to warrant leniency and, based on that determination, the judge sentenced Lord to death.

The Washington Supreme Court affirmed and the U.S. Supreme Court denied certiorari. After exhausting his state remedies by filing an unsuccessful personal restraint petition with the Washington Supreme Court, Lord filed this federal habeas petition. The district court granted the petition as to Lord's death sentence because the state trial court had inappropriately permitted Lord to be cross-examined after his allocution, which ruling the State now appeals. Lord cross-appeals the district court's denial of his three dozen guilt-phase challenges, but we need consider only one.

## I

[1] The right to counsel guaranteed to criminal defendants by the Sixth Amendment "is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *see also Strickland*, 466 U.S. at 686. The Supreme Court in *Strickland* set the bar high for ineffective assistance claims. Petitioner must first establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Recognizing that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," the Court stated: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Such an assessment is highly deferential to defense counsel's decisions at trial, with the attorney presumed to have rendered professionally adequate assistance. *See id.* at 690. A petitioner may overcome this presumption only by demonstrating that "the identified acts or omissions were outside the wide range of professionally competent assistance," *id.*, meaning that the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case, *see id.* at 689.

[2] Even if petitioner shows that his lawyer's performance was deficient, he must still prove that this prejudiced his defense. *See id.* at 687, 693. Though it is not enough for petitioner to establish merely that "the errors had

some conceivable effect on the outcome of the proceeding," he is not required to "show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. To prove prejudice, petitioner must demonstrate only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," with a reasonable probability defined as "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Lord's claim of ineffective assistance turns on counsel's failure to call to the stand three witnesses who, if believed, would have cleared Lord of the murder. However, it is impossible to judge any one piece of evidence without understanding the rest of the case. Omission of an item of proof may seem foolish until one understands the tradeoffs counsel would have had to make to include it. Did the item contradict other defense evidence? Was it so inherently implausible as to undermine defense counsel's credibility? Such questions cannot be answered without a thorough understanding of the case as presented to the jury. We therefore describe what happened at trial before considering the three absent witnesses.

## II

## The Case Against Lord

*Physical Evidence*

To tie Lord to the murder, the State presented physical evidence taken from Tracy's body, her clothing, the red towel, the orange blanket and Kirk Lord's pickup and workshop. The State linked fragments of wood and paint chips, washed sand, sawdust and fibers found on Tracy's body and clothing to similar items found in the pickup and the workshop. Type O human blood, Tracy's blood type, was found on her clothing, the towel and the orange blanket. The bloodstain on the blanket contained an enzyme found in only 9% of the caucasian population, but which was present in Tracy's blood. The State also introduced a matchbook taken from the pickup that was similar to one found under Tracy's clothing.

A coarse body hair that could have come from Lord was found on the blanket, as was a head hair sharing the characteristics of Tracy's hair. Another hair resembling that found on the hairbrush of Lord's girlfriend was discovered on one piece of Tracy's clothing. Coarse body hairs that were similar to both Lord's and Tracy's hair were on the red towel.

Most of the State's blood-related evidence came from Kirk Lord's workshop. Donald Phillips, a state-employed forensic scientist, applied a substance called leuco-malachite green to various surfaces in the workshop. Leuco-malachite green is a reagent that turns green when it comes in contact with blood residue. It is not, however, a specific test for blood, but merely a "presumptive" one because it also reacts to rust, some vegetable juices and certain metals. Phillips testified that the tests he conducted revealed a substance consistent with blood on the workshop floor and other surfaces. He also testified to seeing a positive reaction around the perimeter of a grease stain that Lord had deliberately put on the workshop floor after the murder, presumably to cover traces of blood. On the inside of the workshop's garage door there were drops of Type O blood, which appeared to have hit the door at a high velocity.

However, Phillips was not the ideal witness. He admitted that he had mishandled the testing of a claw hammer, the supposed murder weapon, by spraying it with an excessive amount of leuco-malachite green.[1] He also admitted that he had tried to cover up his mistakes by lying both in an official report and to a superior about the method he used to apply the leuco-malachite green, and that he had been forced to resign because of an internal affairs inquiry into his misconduct in the Lord investigation.

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[1] Phillips disregarded a supervisor's instruction that he apply the leuco-malachite green using the single drop method. This is the preferred method of testing because the reagent is dabbed onto discrete areas, rather than covering the entire surface. By spraying the entire claw-hammer, Phillips made it impossible to retest the hammer under laboratory conditions.

The State's medical examiner testified that Tracy had been killed ten to twenty days before the October 2nd autopsy by numerous blows to the head with a blunt instrument. A wound on Tracy's genitals and the absence of any defensive wounds on her body suggested that she had been raped after being knocked unconscious. The medical examiner concluded that all of Tracy's injuries could have been caused by a hammer similar to the one found in Kirk Lord's workshop.

The State also showed the jury a photograph of the injury on Lord's arm that his guests had noticed on September 16th.

*Lord's Statements*

In his first interview with police on September 24th, a little over a week after Tracy's disappearance, Lord said that he had last seen Tracy about two weeks earlier. When asked whether he had visited the Fryes' house on September 16th, he said he had been there for about five minutes to make a phone call to his brother between 6 and 7 p.m. He claimed to have then driven to his brother's house where he "partied" for about an hour. Lord said that no one was at his brother's house while he was there and that he returned to his apartment between 9 and 10 o'clock.

On September 27th, Lord told two detectives that he hoped Tracy was only a missing person. Later that same day, and before Tracy's body was discovered, Lord commented to a friend that he was probably the last person to have seen her alive.

Lord had his second full interview with police three days later. He provided a similar account of his whereabouts and activities on September 16th, but this time he said that he had arrived at Kirk's house between 8 and 9 p.m. and that the Carrolls were there the entire time. According to police, Lord appeared nervous and told them that "he becomes a different person and he loses control" after smoking marijuana and drinking beer. He claimed not to have had any marijuana or beer for about three weeks.

*Testimony from Machinski and DeMars*

Robert Machinski, a co-worker of Lord's, testified that he and Lord had used an orange U-Haul blanket at Kirk Lord's workshop on the day before Tracy disappeared. He further testified that, a few days later, Lord had rubbed grease into the floor of the workshop for no reason Machinski could discern. Machinski also claimed that after the arrest Lord had offered him inducements to change his statement to police regarding the blanket. In addition, Lord apparently told his friend Thomas DeMars that he would give his grey pickup and dirt bike to anyone who would claim to have been driving Kirk's blue pickup between 7:30 and 8 p.m. on the 16th. DeMars testified that Lord asked him to do it himself or find someone else who would.

*Testimony of Harvey and Belgard*

Rex Harvey, an inmate assigned to Lord as a "trusty" while Lord was in jail awaiting trial, and Sonny Belgard, an inmate occupying a cell near Lord's, testified that Lord had confessed the crime to them. Harvey claimed that Lord told him the following: "I asked her to go cruising around with me at the house I was remodeling, that's where she kept her horse. I hit her in the head with a hammer, raped her in the back of my truck, threw her in a ditch." According to Harvey, Lord also said he "got blood on a U-Haul blanket." Belgard recounted a similar confession with the added detail that Lord had wrapped Tracy's body in a blanket and threw it in the back of the truck before dumping it later on.

*Other Testimony*

The State also presented testimony from the investigating detectives to flesh out its theory of the case. Notable was the testimony of Detective Reichert who examined the scene where Tracy's body was found. Reichert testified that the murderer had probably gotten Tracy's blood on him because the body had been carried, not dragged. This supported the State's theory that Lord had removed, and soon thereafter destroyed, his shirt and other blood-stained clothing. Detective Reichert also testified that the murderer had not tried to hide Tracy's body, which was consistent with the State's

argument that Lord had hurriedly dumped the body before rushing back to Kirk's house to clean up.

**Lord's Defense**

Defense counsel's strategy was to attack the reliability of the State's physical evidence. In particular, they exploited Phillips's admissions of incompetence and misconduct in an effort to cast doubt on the physical evidence he claimed to have gathered at the workshop. They also elicited testimony from an officer who was with Phillips that he had not witnessed any reaction by the leuco-malachite green to the grease spot on the workshop floor. The defense also highlighted subsequent tests of the claw hammer by state forensic experts which had revealed no evidence of bloodstains or other bodily fluids. *See* note 1 *supra*. The defense presented testimony from its own forensic expert and offered other evidence as to the unreliability of the forensic testing methods employed by the Washington State Crime Laboratory.

As for the two inmates, trial counsel tried to impeach Harvey with certain inconsistencies in his testimony and by presenting evidence of his prior convictions for fraud-related crimes. Lord's attorneys also offered testimony from another inmate who claimed that Belgard had admitted to fabricating the confession in exchange for certain prison privileges, including a five-day furlough with his pregnant wife. Trial counsel also suggested that Harvey and Belgard had come up with the details of the alleged confessions by reading newspaper stories about Tracy's murder. Similarly, they tried to raise doubts about the veracity of Machinski and DeMars's testimony by arguing that the two men were either lying or had misinterpreted Lord's comments.

* * *

The State's case against Lord was strong but not ironclad. It was marred by the misconduct and deception of one of its key investigators, a serious problem for a case that was largely circumstantial. While the evidence of other witnesses was helpful, no witness had seen Tracy and Lord together on the day of the murder. Nor was the State able to pinpoint the exact time of the murder, except by suggesting

that it must have happened during the 45 minutes Lord could not account for. Lord, for his part, had no alibi and no alternative theory of how the crime might have been committed. His defense consisted entirely of casting doubt on various aspects of the State's case. We next consider the evidence the defense lawyers declined to present and how it might have dovetailed with the defense strategy.

## III

### The Three Alibi Witnesses

Two days after Tracy disappeared, a police investigator, Officer Avery, contacted two of Tracy's classmates, Paul Holden and Robert Huff, Jr. They told Avery that they had seen Tracy walking along a local road on the previous day, September 17th. Holden, Huff and a third boy, Greg Ayers, had been driving together when they passed a young woman they believed was Tracy. According to Avery's report, after he "questioned them several times about the location, day and time," Holden and Huff remained "adamant that they were correct and said they are familiar with Tracy and know her well enough to recognize her." A few days later, on September 21st, another policeman, Officer Lewis, spoke with Holden, Huff and Ayers, about what they had seen on September 17th. All three confirmed that they had seen Tracy that day, which was a day after Lord is supposed to have killed her.

In October 1986 and again in January 1987, the three boys told essentially the same story to defense investigators hired by Lord's first attorney, Mark Yelish, and his trial counsel, Ron Ness and Judith Mandel. Though there were some inconsistencies in their recollections of what the young woman was wearing, and Huff was somewhat less certain about the exact day than he had been during his September 18th police interview, none of the boys backed down from the assertion that it was Tracy they saw walking along the road on September 17, 1986.[2] Huff and Holden also firmly discounted

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[2] Though Huff could not recall the exact date or day of the week he saw Tracy when he was interviewed in January 1987, he sensibly told the investigator that his police statement of September 18, 1986, would have

any suggestion that the young woman might have been Tracy's older sister, Shannon, whom they both knew.[3]

None of the boys had any connection to Lord. Though they knew Tracy from high school, they were not her former boyfriends or schoolyard enemies, but mere acquaintances. All three were willing to testify; none had anything to fear or anything to gain. If the jury had accepted Holden, Huff and Ayers's story that they had seen Tracy that evening, the State's case would have suffered a serious blow, dependent as it was on Lord's mysterious whereabouts and activities between 8 and 8:45 on the evening of September 16th. The State presented no evidence that Lord could have killed Tracy after the time these boys supposedly saw her on September 17th.

What did defense counsel do with these witnesses? Nothing at all. Lord's trial attorneys testified at an evidentiary hearing in district court that they simply did not believe Holden, Huff and Ayers, and had been concerned that putting them on the stand would have harmed their own credibility with the jury. None of the lawyers ever talked to the boys; rather, they relied on the reports of police and investigators. But the first investigator's October 1986 reports merely described the boys' accounts, which were substantially identical to the ones they had given the police in September. The second investigator's January 1987 reports did refer in very general terms to some wavering on which day the boys had seen Tracy, and mentioned the absence of a temporal landmark that would have indelibly fixed that day in their minds. However, nowhere did these reports, or those of police investigators, suggest that the boys' stories were unworthy of belief.

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been more accurate as it was given only two days after Tracy disappeared and only a day after he claimed to have seen her alive.

[3] Shannon testified at Lord's trial that she had been out searching for her sister on September 17th.

**Police Reports of September 18 and 21, 1986**

On September 18, 1986, two days after Tracy's disappearance, Officer Avery reported that Holden and Huff had told him the following:

> [T]hey saw Tracy yesterday (9-17-86) at around noon near the Scandia 'dip' (Virginia Loop & Viking Way intersection). They said she was wearing blue jeans and some description of sweat shirt, which they were unsure of. They said she was walking towards Hwy 308 and looked like she was depressed (hanging head, slow gait, etc.). I questioned them several times about the location, day and time. Both boys were adamant that they were correct and said they are familiar with Tracy and know her well enough to recognize her.

Three days later on September 21st, Officer Lewis spoke to Huff who repeated the story he had told Officer Avery:

> HUFF stated that he saw TRACY Eastbound on Hwy 308, towards Keyport, from Viking way, last Wednesday [September 17, 1986]. HUFF stated that TRACY was wearing blue jeans and a multi colored flannel shirt, and that he was positive that it was TRACY, as he saw her full face as they drove by. . . . HUFF said that TRACY was walking alone, and seemed depressed, but did not appear to have anything else wrong with her.

Officer Lewis spoke to Ayers and Holden that same day. Ayers reported that "he also saw TRACY walking towards Keyport from Viking Way on Wednesday, and thought she was wearing something yellow, possibly a jacket. AYERS stated that there did not seem to be anything wrong with TRACY, and she was alone." Holden provided Officer Lewis with a more detailed description of what he remembered, though he told Lewis that he and his friends had driven by

Tracy between 5:30 and 6 p.m. on the 17th whereas Officer Avery's report had put the time at noon:

> I . . . asked Paul [Holden] when the last time he had seen Tracy PARKER was and he stated Wednesday, 09-17-86, at approximately 5:30 to 6:00 PM. I asked him if he was sure on the date and time and he stated yes, he was positive. I asked where he had seen her and he stated it was just prior to the intersection of Silverdale Way and Viking Way and 308 and Bangor Road which is Luoto Road. Paul stated she was walking on the north side of Highway 308 toward Keyport/Scandia area which was located on the north side of the road. . . . I asked him if he got a real good look at her and he stated yes, all three in the vehicle did get a look at her because they mentioned to themselves of who she was when they had seen her. . . . I asked him if he knew what she was wearing and he stated blue jeans and a plaid button-up shirt. I asked if any jacket was seen and he said no.

Holden also explained why he was certain he saw Tracy on September 17th:

> I . . . asked [Holden] if he was sure on the date he had seen Tracy PARKER and he stated he was positive because of AYERS. I had him explain and he stated on Wednesday he wouldn't have gone down that way or come back and he had checked and all three of them were in the vehicle on Wednesday (meaning AYERS, him and HUFF) and they went down to pick up AYERS and they were driving back up away from AYERS residence on 308 when they saw Tracy.

Though there were some discrepancies in the boys' statements about what the young woman was wearing and the time of day they saw her, there is no indication from the police reports that Holden, Huff and Ayers wavered in their belief that

they saw Tracy walking alone near Highway 308 and Viking Way on September 17th.

**Defense Investigators' Reports of October 1986 and January 1987**

Scott O'Neal, a defense investigator hired by Lord's first attorney, interviewed Holden on October 13, 1986. Holden told O'Neal that he, Huff and Ayers had seen "a girl whom they believed to be Tracy Parker on Wednesday, the day after her disappearance between the hours of 5:30 p.m., and 6:00 p.m." Holden went on to say that "he could not testify that he was 100% factually certain that it was Tracy as he only had a five second glance at the girl. He indicated that the girl looked like Tracy Parker to him as well as Bob Huff and Greg Airs [sic]. The three of them agreed that it was Tracy Parker." O'Neal reported that Holden "indicates that he is familiar with Shannon Parker, Tracy's sister. He is certain that the girl that they saw was not Shannon Parker." Holden also reiterated what he had told Officer Lewis that "he was certain that the day of the week was Wednesday [September 17, 1986] because [Ayers] was in the car. [Ayers] was not with him on Tuesday." Finally, O'Neal noted Holden's claim that "none of the boys were drinking that day and none had been smoking any pot on that day. They had spent the day clam digging on Virginia Point Road."

On October 27th, O'Neal interviewed Huff who elaborated on the story he had told to Officers Avery and Lewis:

> After finishing with clam digging [Huff, Holden and Ayers] went to Hadlock and then returned to the Poulsbo area where they pick up Greg at his parent's house. They then headed to [Holden's] house. At the intersection in front of the subbase at Keyport they saw Tracy Parker. [Huff] described her as being dressed in a flannel top wearing blue jeans. He could not recall the color of the flannel shirt.

Huff also claimed to have gotten a good look at the girl: "He indicated also that the car was slowing to a stop at the time that

they saw Tracy. He indicated that Tracy looked at the car." Huff was no less certain than Holden that the girl they saw was not Tracy's sister and that the date was September 17th:

> He knows Tracy's older sister, Shannon. He had two classes with Shannon during his senior year. He has talked with Shannon on numerous occasions. There is no doubt in his mind that the girl that they saw walking along the road was not Shannon Parker. He is also absolutely certain that it was Wednesday evening [September 17, 1986] that they saw Tracy walking on the road. He has no specific recall of what they did on Tuesday. On that following Thursday they played pickleball.

On October 21st, Ayers gave O'Neal a similar account of what happened that day:

> [Ayers, Holden and Huff] were heading to [Holden's] house after clam digging on Virginia Point. . . . [They] all saw Tracy walking on the side of the road at the intersection just prior to entering the base at Keyport on Highway 308. . . . He is certain that it was Wednesday [September 17, 1986] that they saw Tracy and believes it was between 4:00 and 6:00 p.m. He indicates that he is reasonably certain that he was not at that location on Tuesday [September 16, 1986]. He could not tell me what it was that he did on Tuesday. He indicates that he does recall what he did on Wednesday of that week. He described the weather as being overcast and somewhat drizzlly on Wednesday.

Unlike Holden and Huff, however, Ayers had "no recall of how Tracy was dressed."

Bob Zornes, a second investigator hired by Lord's trial counsel, interviewed Holden and Ayers on January 6, 1987, about three and a half months after the boys gave their first statements to police. Zornes concluded that "their report that they had seen Tracy Parker on September 17th remained unchanged." He commented, however, that "when pressed about the exact day they would at times waver. Holden said

that he and ROBERT HUFF, JR. had gone clam digging on either Monday or Tuesday of the week beginning September 15, 1986, and that Greg Ayers joined them on the second day, which would have been either Tuesday or Wednesday." Zornes also remarked that "we tried to time reference the incident but about all that they could come up with was that they thought that they were told by Huff's father about Tracy's disappearance the next day, which they said was Thursday. Otherwise their activities were not unusual."

Zornes interviewed Huff by telephone two weeks later on January 19th. Huff "recalled the day that he saw Tracy Parker walking alongside the highway. However, he could not recall the exact date of the sighting, nor the day of the week." Huff then qualified his uncertainty: "He said that the report that he gave to the police would have been the most accurate, since it was fairly recent in relation to when he had seen her."[4] Zornes noted that Officer Lewis had taken Huff's statement on September 21, 1986, and that "[Huff] told Lewis that it was Wednesday [September 17th] that he had seen [Tracy]." The details of Huff's statement about where he saw the girl, her appearance and his certainty that she was not Tracy's sister remained essentially unchanged. As for providing a fixed time reference, Zornes reported that "[Huff] was not able to reference the date any better than previously, saying that he would have to stand by his earlier statement to the police in which he said that he observed her on Wednesday."

Though the reports prepared by O'Neal and Zornes reveal some haziness in the boys' memories, none offers any conclusions as to the accuracy and credibility of their story, or suggests that the boys expressed any significant doubt that they saw Tracy alive on Wednesday, September 17, 1986.

**Affidavits and Testimony of Holden, Huff and Ayers**

In support of his federal habeas petition, Lord presented affidavits and testimony from the now adult Holden, Huff and Ayers at an evidentiary hearing before the district court.

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[4] Indeed. Huff had been interviewed by police on September 18th, only a day after the sighting, and again a few days later on the 21st.

Holden's affidavit reaffirmed the story he had told police and defense investigators in 1986:

> On September 17, 1986, I went clam digging with Greg Ayers and Bob Huff at the private beach near Keyport. . . . As we were returning at about 5:30 that afternoon, we saw a girl that we recognized as Tracy Parker walking east along the north shoulder of Highway 308 about 100 yards east of the intersection with Viking Way. . . . I was driving the car and got only a brief look at her. But we all agreed that it was Tracy Parker we saw. The location was within a mile or two of Tracy's home, and we assumed at the time that she was walking home.

Holden also stated that,

> [t]here was no question in our minds that this was on Wednesday, September 17. . . . Greg Ayers and I have talked about this recently and we still agree that Tracy Parker was the girl we saw walking along the highway that afternoon. . . . After being interviewed by a police officer and the defense investigator, I was somewhat surprised that I was not asked to testify in the murder trial. If I had known at the time that Tracy allegedly was killed the day before we saw her, I really would have been surprised.

Holden's testimony at the evidentiary hearing confirmed the contents of his affidavit:

> QUESTION: At the time that you related that information [about seeing Tracy on Wednesday, September 17th] to the police, were you confident about the information you were giving police?
>
> ANSWER: I was confident.
>
> QUESTION: You were confident about the dates you were relaying to the police?

ANSWER: I was confident.

QUESTION: And you were positive that it was Tracy Parker that you had seen?

ANSWER: I'm absolutely positive it was Tracy Parker.

The affidavits and testimony of Ayers and Huff closely correspond to Holden's, with both men representing that they were sure of the date and the girl's identity when they spoke to police and investigators in the months following Tracy's murder.[5]

**Ness and Mandel's Testimony**

At the district court evidentiary hearing, Ron Ness and Judith Mandel, Lord's trial attorneys, testified as to why they did not put Holden, Huff and Ayers on the stand. Ness testified that he had been in possession of the police and first defense investigator's reports, but had decided not to pursue this angle because "[Holden, Huff and Ayers's] observations, based on our investigation, probably were not helpful to what our defense was. Taking into consideration everything." Ness further explained that "[w]e did not believe that [Holden, Huff and Ayers] were accurate. And we were concerned about our credibility with the jury in presenting testimony that may not have been beneficial." However, when asked whether the boys' statements were consistent with their defense that Lord had not murdered Tracy, Ness responded that "[a]s far as whether or not Mr. Lord had committed the crime, they were consistent with that, yeah."

On cross-examination, Ness had this to say of Zornes's report:

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[5] Obviously, Lord's lawyers would not have been aware of these affidavits and testimony, as they did not exist at the time of trial. We consider these materials as an indication of what the lawyers likely could have elicited from the witnesses had they put them on the stand.

> If I recall, the gist [of Zornes's report] was that the three individuals were not very positive in either identification or timing. . . . We felt that [calling Holden, Huff and Ayers as witnesses] would affect our credibility with the jury because of the nature of what we had discovered in terms of their interviews with our investigator and, I believe, with the police.

The court tried, but failed, to elicit more specifics about Ness's concerns:

> COURT: What was it about [Holden, Huff and Ayers's] anticipated testimony that made you think it would damage the defense credibility? Was it what Zornes said, something Zornes said?
>
> ANSWER: That they were not positive that the-that, like I said, the identification and/or the timing was not real strong. And there was such a—if I recall, such a large amount of evidence indicating the last time she'd been seen was on the 16th. . . .

Ness conceded that his judgment of the boys' credibility was based entirely on the police and defense investigators' reports, as neither he nor his co-counsel ever spoke to the boys themselves.

When asked why Holden, Huff and Ayers were not called as witnesses, Mandel gave an even vaguer answer:

> If there were three young men who said they saw her and—said they saw her and knew it was that date and knew it was that time, when we went back through and evaluated that testimony, we decided not to present it.
>
> I mean, I don't know how else to explain that to you. Other than it did not appear to us to be testimony as you're characterizing it. That is,

> testimony that had this-that linked the time, the place and the date as you have said it.

Mandel was then asked whether she believed "that if you presented the testimony of people who claimed to have seen Tracy Parker after September 16th, that that would open the door to any damaging evidence that would harm Mr. Lord?" She responded, "Open the door—no. I don't think it would open—I don't know how it would have opened any door that would have harmed him."

## IV

[3] "A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, No. 9815932, 1999 WL 387247, at *3 (9th Cir. June 15, 1999). Mindful of the deference we owe counsel's trial strategy, we nevertheless conclude that counsel's cursory investigation of the three possible alibi witnesses, and their subsequent failure to put them on the stand, constitute deficient performance that was prejudicial to Lord's defense.

[4] Though trial counsel claim that the statements of Holden, Huff and Ayers were vague and/or inaccurate, the police and investigator reports on which they relied in 1987 do not support their judgment. Holden and Huff spoke to the police the day after they saw the girl they thought was Tracy, and again a few days later. These reports were taken the closest in time to Tracy's disappearance and, not surprisingly, contain the fewest discrepancies.[6] The most important

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[6] The only significant discrepancy was the time of day the boys claimed they saw Tracy, with Officer Avery's notes of his interview of Holden and Huff setting it at about noon and Officer Lewis's report of his interview with Holden setting it between 5:30 and 6 p.m., which was the time the boys stuck to thereafter. However, no one ever asked them about this discrepancy at the time they gave their statements in 1986 and early 1987, and we have no way of knowing whether this was an actual discrepancy or a mistake in Officer Avery's notes.

elements of the boys' statements remained consistent in each interview with police and defense investigators during the four-month period following Tracy's disappearance and murder: After going clam digging together on Wednesday, September 17, 1986, they saw a girl they believed was Tracy walking near Highway 308, and were certain the girl was not Tracy's sister, Shannon. Nor did any of the police or defense investigators conclude that the boys' statements were inaccurate. Zornes, for example, merely reported that the boys could not come up with a compelling temporal landmark to fix the day they saw Tracy.

[5] Contrary to trial counsel's impressions, Holden, Huff and Ayers never expressed any significant doubt about the sighting. In 1986 and 1987, they steadfastly told the police and defense investigators that they were sure about their story.[7] To this day, none of the three has wavered from his belief that it was Tracy Parker whom they saw on September 17, 1986. In fact, Ayers maintained in his affidavit that "I have never suggested to anyone that there was doubt [about seeing Tracy on September 17]," a statement echoed by Huff who said in his affidavit that "I have never expressed doubt about the identification or the date."

Though the boys had slightly inconsistent recollections of the sighting, all of the discrepancies were minor and turned

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[7] Officer Avery's report: "I questioned [Holden and Huff] several times about the location, day and time. [They] were adamant that they were correct and said they are familiar with Tracy and know her well enough to recognize her." Officer Lewis's report: "I . . . asked [Holden] if he was sure on the date he had seen Tracy PARKER and he stated he was positive. . . ." Defense investigator O'Neal's reports: "[Holden] was certain that the day of the week [that they saw Tracy] was Wednesday [September 17, 1986]"; "[t]here is no doubt in [Huff's] mind that the girl that they saw walking along the road was not Shannon Parker. He is also absolutely certain that it was Wednesday evening [September 17, 1986] that they saw Tracy walking on the road"; "[Ayers] is certain that it was Wednesday [September 17, 1986] that they saw Tracy." Defense investigator Zornes's report: "[Holden and Ayers's] report that they had seen Tracy Parker on September 17th remained unchanged."

on the kind of highly specific details that eyewitnesses often remember differently. *Cf. United States v. Ginn*, 87 F.3d 367, 369 (9th Cir. 1996) (discrepancies in eyewitness accounts of what a robber was wearing and whether he displayed a gun did not render the testimony insufficient to support the robber's conviction). After carefully reviewing the various statements given by Holden, Huff and Ayers over the years, we are struck by the monotonous consistency of their stories and the steadfastness with which they keep insisting that it was Tracy Parker they saw on September 17, 1986.

[6] Trial counsel's failure to present their testimony was all the more questionable in light of the weaknesses in the prosecution's case against Lord. The prosecution had no DNA evidence or witnesses to the murder; no one had seen Tracy and Lord together on the day she disappeared; none of the trace physical evidence introduced at trial conclusively tied Lord to the crime; and much of the blood-related evidence was tainted by Phillips's mishandling of the leuco-malachite green tests, not to mention his subsequent attempts to cover up his mistakes.

[7] Holden, Huff and Ayers's mutually reinforcing statements were probably the strongest evidence of Lord's innocence that trial counsel could have offered. The case they actually presented consisted solely of attacks on the reliability of the State's physical evidence and the credibility of its witnesses; they presented no contrary physical proof, no satisfactory explanation of the inconsistencies in Lord's statements about his whereabouts on the evening of Tracy's disappearance and, perhaps most importantly, no alibi. Holden, Huff and Ayers, three young men with no ties to Lord and with no reason to lie, could have given Lord a formidable defense: The victim was seen walking around well after the time Lord was supposed to have killed her.

[8] Had the jury believed the boys' testimony, Lord's suspicious behavior on the evening of September 16th could have been seen as odd but hardly indicative of murder. Similarly, his efforts to influence testimony might have been dismissed as an innocent man's desperate attempt to concoct an alibi. This would have left Lord's jail-house confessions to witnesses who had been partially impeached and, in any event,

were subject to doubt because of their evident self-interest in pleasing the prosecution. Presenting the testimony of the boys would not have entailed significant costs in terms of the defense strategy. Ness and Mandel conceded that the boys' statements dovetailed with their defense and would not have opened the door to any damaging evidence. Nor would the proffer of three witnesses, who were unrelated in any fashion to the defendant or the victim, have tainted Lord's attorneys. The jury might have believed the boys were mistaken, but certainly would not have thought that counsel was presenting manufactured testimony.

**[9]** We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story.[8]

**[10]** Here, counsel appear to have made their decision to exclude the three witnesses based on a vague impression—apparently a misimpression—that the police and investigators who spoke to the witnesses did not find them credible. We find no such suggestion in the various reports, and this impression may have been dispelled had counsel talked to the boys.

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[8] Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively, *see LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir.), *cert. denied*, 119 S.Ct. 422 (1998); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir.1986). However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor—factors we are not in a position to second-guess.

Having now heard their story—from their affidavits and district court testimony—we believe a competent attorney would not have failed to put them on the stand.[9]

[11] We cannot say that the government's case was so strong that the testimony of these three witnesses could not have raised a reasonable doubt in the minds of the jurors. Rather, we find the possibility that their testimony would have led to Lord's acquittal to be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If Holden, Huff and Ayers had testified, the State might still have won a conviction by exploiting the inconsistencies in their accounts or convincing the jury that it was Tracy's sister they saw that day. That, however, would be a very different case. As it is, we find ourselves "in grave doubt as to the harmlessness of an error that affects substantial rights," and must conclude that counsel's omission of this evidence prejudiced Lord's defense. *O'Neal v. McAninch*, 513 U.S. 432 (1995).

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[9] Of course, had Lord's attorneys been certain that Holden, Huff and Ayers's statements were false, the rules of professional conduct would have precluded them from putting the witnesses on the stand. *See* Restatement (Third) of the Law Governing Lawyers § 180(1)(c) (Tentative Draft No. 8, 1997) ("A lawyer may not . . . offer testimony or other evidence as to a material issue of fact known by the lawyer to be false."). Counsel also were under no obligation "to offer testimony or other evidence that [they] reasonably believe[ ] is false, even if [they] do[ ] not know it to be false." *Id.* § 180(3). However, the Restatement makes it clear that "[a] lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false." *Id.* § 180 cmt. c. Lord's attorneys have never claimed that they knew the witnesses' statements were false, nor that they were in possession of any facts beyond those contained in the police and investigator reports. Based on that evidence, Lord's lawyers certainly could have concluded that their client was guilty, and that the boys must therefore have been mistaken. But counsel's belief in their client's guilt certainly cannot create an ethical bar against introduction of exculpatory evidence.

We have found similar omissions of potentially exculpatory evidence to constitute deficient, and prejudicial, performance by counsel. We held in *Brown v. Myers*, 137 F.3d 1154, 1158 (9th Cir.1998), that trial counsel's failure to investigate and put on the stand possible alibi witnesses constituted ineffective assistance which "prejudiced [petitioner] to the extent that it undermines confidence in the outcome of his trial." In *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994), Sanders's brother made out-of-court confessions to the murder for which Sanders was convicted. We determined that counsel's failure to call the brother to testify at trial or, if he invoked the Fifth Amendment, to introduce the brother's extra-judicial statements, was professionally deficient performance. *See id.* at 1457-60. Such evidence would clearly have provided a strong defense and "[counsel's] failure to investigate [was] inexplicable, as [was] his failure to utilize [the brother's] confession, except as the result of incompetence and indifference." *Id.* at 1459. In *Hart v. Gomez*, 1999 WL 387247, Hart was convicted of molesting his daughter during visits to a camping resort. His daughter had testified that "Hart *never* molested her during visits on which he was accompanied by another adult." *Id.* at *1. Hart's girlfriend testified at trial that she had been with him during all of the trips alleged in the information, and had witnessed no molestation. *See id.* Hart's trial counsel, however, did not introduce grocery receipts and the girlfriend's personal calendars, which would have corroborated her testimony that she was present at all of the trips and, thereby, "demonstrate[d] [Hart's] factual innocence [.]" *Id.* at *3. We concluded that "[the girlfriend's] evidence, if believed by the jury, would have demonstrated the truthfulness of her testimony and established that . . . no molestation occurred during the time period set forth in the information—or at the least that the molestation as charged in the information had not been proved beyond a reasonable doubt." *Id.*

[12] As in *Brown*, *Sanders* and *Hart*, Lord's trial counsel had at their fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence and use it at trial. When questioned about their reasons, they have offered no persuasive justification. Their performance therefore fell "outside the wide range of professionally competent assistance" that *Strickland* requires,

466 U.S. at 690, and we conclude that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

## Conclusion

The district court's order denying Lord's petition for a writ of habeas corpus as to the guilt phase of his trial is **REVERSED**. The state's appeal is dismissed as moot. We remand to the district court for proceedings consistent with our ruling.

[FILED]

[September 23, 1999]

**Not for Publication**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**BRIAN KEITH LORD,**

Petitioner-Appellee,

v.

**TANA WOOD, Superintendent,**

Respondent-Appellant.

No. 97-99025

D.C. No. CV-94-00464-R

**BRIAN KEITH LORD,**

Petitioner-Appellant,

v.

**TANA WOOD, Superintendent,**

Respondent-Appellee.

No. 97-99026

D.C. No. CV-94-00464-R

**ORDER**

Before: **BROWNING, KOZINSKI** and **T.G. NELSON**, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | |
|---|---|
| BRIAN KEITH LORD,<br><br>Petitioner,<br><br>v.<br><br>TANA WOOD, Superintendent of Washington State Penitentiary at Walla Walla,<br><br>Respondent. | NO. C94-464R<br><br>ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR WRIT OF HABEAS CORPUS |

THIS MATTER comes before the court on a petition for writ of habeas corpus by petitioner Brian Keith Lord. Having reviewed the petition together with all documents filed in support and in opposition, having heard oral argument and held an evidentiary hearing, and being fully advised, the court finds and rules as follows:

## I. FACTUAL BACKGROUND

On July 18, 1987, petitioner Brian Keith Lord was convicted by a jury in the Kitsap County Superior Court of aggravated first degree murder and felony murder stemming from the death of 16-year-old Tracy Parker. After a penalty hearing before the same jury, petitioner was sentenced to death

pursuant to the jury's finding that there were not sufficient mitigating circumstances to merit leniency.

According to the state, Lord had encountered Tracy Parker, with whom he was previously acquainted, at the home of Wayne and Sharon Frye, driven her to his brother Kirk Lord's workshop, struck her with a hammer found in the workshop, and raped and killed her. According to the state's theory, Lord then wrapped her body in an orange U-Haul blanket, dumped it a short distance from the edge of a road about three miles from the workshop and discarded her clothes at another location.[1]

The state's case was built on circumstantial evidence including information about Lord's whereabouts on the night in question which indicated that he had the opportunity to kill her as well as more than 100 pieces of trace evidence linking Lord to the crime. The state also relied on testimony as to confessions which Lord made to two prison trusties while Lord was incarcerated awaiting trial, and as to efforts which Lord made to convince witnesses to alter their testimony in his

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[1]A detailed description of the evidence presented to the jury by the state can be found in the majority opinion deciding Lord's direct appeal. State v. Lord, 117 Wn.2d 829, 838-848, 822 P.2d 177 (1991).

favor. Lord's defense at trial was that he had not committed the crime.

Lord's conviction was affirmed on direct appeal. State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991). A motion for reconsideration was denied on March 17, 1992. The United States Supreme Court denied Lord's petition for a writ of certiorari on October 5, 1992. Lord v. Washington, 506 U.S. 856 (1992). Lord's personal restraint petition was denied. In the Matter of the Personal Restraint of Brian Keith Lord, 123 Wn.2d 296, 868 P.2d 835 (1994). The United States Supreme Court denied Lord's petition for writ of certiorari on October 3, 1994. Lord v. Washington, 513 U.S. 849 (1994).

Lord's habeas corpus petition raising numerous issues about both the guilt and the penalty phases of his trial is now pending before this court.

## II. LEGAL DISCUSSION

### A. Applicable Legal Standards

In order to show that he is entitled to a writ of federal habeas corpus, Lord must establish that "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (a). State court findings of f act

made after a full, fair and adequate hearing are entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and are reviewed for clear error. Jeffries v. Blodgett, 5 F.3d 1180, 1187 (9th Cir. 1993). Once a petitioner has demonstrated the existence of constitutional trial error, he or she must then show that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993), quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).

B. Guilt Phase Issues

1. Claims concerning scientific evidence

a. Donald Phillips

Donald Phillips was a forensic scientist with the Washington State Patrol (WSP) Crime Laboratory at the time of the murder of Tracy Parker. On September 29, 1986, before the discovery of Parker's body, Phillips accompanied Detectives Douglas Wright and Douglas Hudson of the Kitsap County Sheriff's Department to the workshop of Kirk Lord, petitioner's brother, in order to examine it for possible evidence related to Parker's disappearance.

In particular, Phillips and the detectives were looking for evidence of blood stains. To this end, Phillips had brought with him a substance called leuco-malachite green, which is a presumptive test for blood. In the presence of blood, leuco-malachite green turns an intense blue-green color. However, the test is only presumptive because other substances can also cause the leuco-malachite green solution to experience a color change. Moreover, leuco-malachite green does not distinguish between human and animal blood. Thus, additional testing is necessary to confirm the presence of human blood in any given location.

Testing with leuco-malachite green can be accomplished by several methods including the use of eyedroppers or a spray bottle. Before Phillips left the crime laboratory for the Kirk Lord workshop, he was specifically instructed by the laboratory director, Kay Sweeney, to use the eyedropper method in applying the leuco-malachite green to sites of interest rather than spraying an area.

While he did use the eyedropper method during numerous tests, Phillips thereafter sprayed leuco-malachite green on an area of the workshop. Detective Hudson was not

present when Phillips sprayed the area, but he testified at the evidentiary hearing before this court that at some point after the spraying had occurred, Phillips called him into the garage and brought his attention to a hammer which Phillips was holding by the tip of the handle with the head hanging down. Hudson indicated that leuco-malachite green covered the hammer from the head to midway down the handle and that it was dripping off the hammer.

According to Hudson's testimony at the evidentiary hearing, Phillips indicated that he had found the hammer in a pile of cords or hoses after he had sprayed the pile and acknowledged that he had made a mistake by applying an excessive amount of leuco-malachite green to the hammer.[2] Phillips concluded that the reaction of the leuco-malachite green was consistent with the presence of blood on the hammer and Hudson concurred. Hudson testified that he placed the

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[2] While there is considerable dispute among the experts about some aspects of the chemistry and preferred method of using leuco-malachite green, there is no dispute that applying too much solution to the sample being tested lessens and may totally eliminate the ability to do further testing because the leuco-malachite green consumes the sample and disturbs any other trace evidence which may be on the sample. It was this realization which caused Phillips to acknowledge having made a mistake in spraying the hammer.

hammer in a paper bag in the back of his car and later transported it to his laboratory at the sheriff's office. It was this hammer which the state sought to prove was the murder weapon during trial.

While in Kirk Lord's workshop, Phillips also sprayed leuco-malachite green on and around a grease spot on the floor and concluded that the reaction around the area of the grease spot was consistent with the presence of blood. No one else saw evidence of this reaction at the time.

On October 2, 1986, the hammer was submitted to the WSP Crime Laboratory for further analysis. Criminalist Michael Nolan examined the hammer and found no evidence of bloodstains. WSP Seattle crime laboratory director Kay Sweeney thereafter asked Phillips how he had tested the hammer on September 29, 1986. Phillips stated that he had applied one drop of leuco-malachite green on the outside of the hammer head at the notch of the claw and that this drop had reacted positively for the presence of blood.[3]

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[3] At the evidentiary hearing before this court, Sweeney testified that Phillips told him three different versions of how he had tested the hammer, all of them false.

After talking with Nolan on October 23, 1986 and being informed that Nolan had conducted an exhaustive second examination of the hammer, Sweeney himself examined the hammer for any indication of bodily fluids. He found none. He also asked another criminalist in the office, Chesterene Cwiklik, to examine the hammer for evidence of leuco-malachite green. Her examination revealed no proof of its presence on the hammer.

On November 3, 1986, Phillips submitted a written report with diagrams to Sweeney detailing his activities at the Kirk Lord workshop on September 29, 1986. This report was false in that it indicated he had used the drop method of testing the hammer rather than the spray method. Upon Sweeney's discovery that the report was false, an internal investigation of Phillips ensued which was conducted by the WSP Internal Affairs Section. Phillips resigned from his position effective December 26, 1986.

Defense counsel did not receive any information about Phillips and the internal investigation before the beginning of trial. Although defense counsel sought over a period of several months prior to trial to schedule Phillips' deposition, they did

not succeed in talking to him until May 20, 1986 during jury selection nor did they receive any report from him about his work on the case until that date. Phillips did not mention during his deposition that he had been the subject of an internal investigation.

Defense counsel only became aware of the internal investigation after Phillips' deposition when one of the Kitsap County detectives working on the case commented in a casual conversation with defense counsel in the hallway outside the courtroom that he had been interviewed during the investigation. On June 1, 1986, defense counsel brought the issue before the court and asked for discovery. The prosecutor denied having any reports or discoverable information on the subject.

On June 2, 1986, the court held a hearing regarding the admissibility of the leuco-malachite testing which Phillips had done in the Kirk Lord workshop. The defense position was that the spraying technique employed by Phillips was not generally accepted in the scientific community. Phillips himself did not testify at that hearing.

After the hearing, defense counsel Ron Ness moved for an order requiring the production of any information regarding the internal investigation of Phillips which related to the case. In an effort to speed the process, the trial judge agreed to act as an intermediary by contacting the attorney for the WSP and asking for the release of any relevant documents regarding the internal investigation of Phillips. On June 4, 1986, she indicated to counsel that she had received several documents, had reviewed them in camera and would release them to counsel with two minor deletions not relevant to Lord's case. Included in the information received by defense counsel at that time was a report dated February 4, 1987 and prepared by Detective Sergeant Cary C. Matthews of the WSP Internal Affairs Section which summarized the allegations against Phillips. This report did not contain any conclusions.

Again through the judge's intercession, defense counsel also received the transcripts of several interviews of crime laboratory personnel taken during the investigation. The judge indicated to defense counsel and they accepted her assurance that they had received all relevant documents.

In fact, not all of the available, relevant information associated with the internal investigation was provided to defense counsel. An inquiry several years later by Lord's current counsel into Phillips' personnel records revealed several reports and other documents directly pertaining to Phillips' credibility and qualifications as a criminalist as well as findings about the lack of trace evidence on the hammer which were not disclosed to defense counsel at trial.

These documents included a report dated November 6, 1986 by Kay Sweeney to his superior, John Anderson, in which he outlined in great detail the same violations by Phillips of crime laboratory regulations contained in the reports given to defense counsel. These included lying to a supervisor about the processing of evidence, insubordination in not following directions from a supervisor about how to test evidence, using a method which contaminated evidence in a homicide investigation, and falsifying an official crime laboratory report.[4] At the end of this report, Sweeney concluded that Phillips should be terminated from his employment.

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[4] Detective Sergeant Matthew's report, which defense counsel received on June 4, 1987 during trial, contained a summary of these allegations.

Other documents which Lord's trial counsel did not receive included two WSP internal memoranda indicating that although the investigation of Phillips was never completed because of his resignation, the evidence was consistent with findings that he disobeyed a supervisor's instructions, lied to a supervisor and filed a false report. The memoranda further recommended dismissal on the basis of the false report.

Lord points out that his trial attorneys were told and there was testimony before the jury that while an internal investigation of Phillips had been commenced, no conclusions were reached or recommendations made because of Phillips' resignation.

Another type of evidence not made available to defense counsel at trial involved an examination of the hammer performed by Chesterene Cwiklik in the fall of 1986 at Sweeney's request to determine whether the hammer had been sprayed with leuco-malachite green. According to an affidavit dated May 12, 1995, she averred that her test was non-

conclusive in that she could find no conclusive signs that the hammer had ever been sprayed with leuco-malachite green.[5]

By the time Phillips testified for the prosecution on June 17, 1986 about his activities at the Kirk Lord workshop, defense counsel were aware that Phillips had been dismissed from his job at the WSP crime laboratory in 1985 and reinstated pursuant to a successful appeal in late 1985. The immediate reason for the dismissal was not relevant to the issues of Phillips' credibility and reliability of his test results in Lord's case.[6] However, other information which defense counsel did not have included the fact that Phillips had also been investigated in 1985 for falsification of his employee applications.[7] Furthermore, when he was reinstated in late 1985, he was assigned to a drug analysis unit and told that he would no longer be permitted to go to crime scenes. The Kirk

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[5] Current counsel for Lord argued that this result might indicate that Phillips had wiped the hammer off in an effort to conceal his spraying of the object.

[6] The incident which precipitated Phillips' dismissal involved showing evidence in a case to an unauthorized person.

[7] When Phillips applied to work at the WSP Crime Laboratory in 1970, he claimed to have a Bachelor of Science degree although he had not in fact completed a college degree.

Lord workshop was the first crime scene to which he had been sent since his reinstatement.

The last documentary evidence which Lord alleges his counsel should have been provided before trial is an employee performance evaluation of Phillips for the period from December 9, 1985 to October 5, 1986. That evaluation indicated that in some areas, Phillips failed to meet minimum requirements.

i. Brady violation

Lord now contends that the failure to disclose all exculpatory evidence and impeachment information constituted a violation of his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), and requires reversal of his conviction. He argues that Phillips was the key witness in support of the admissibility of the hammer as murder weapon. Phillips was the only witness who testified to seeing a reaction consistent with the presence of blood around a grease spot on the workshop floor.

The state concedes that not all of the available information was turned over, but has two arguments in response. First the state asserts that because the prosecutor did

not have physical possession of the documents in question, he had no responsibility to turn them over to defense counsel.

This argument has no merit. As the United States Supreme Court made very clear in Kyles v. Whitley, 514 U.S. 419, 438 (1995), the prosecution's obligations under Brady extend to any exculpatory or impeaching information not only in its possession but also in the possession of any affiliated agency working on the investigation. In this case, the WSP Crime Laboratory was working very closely with Kitsap County detectives and was the agency in charge of examining all of the trace evidence thought to be linked to Tracy Parker's murder.

The state's attempt to argue that the prosecutor was not aware of the undisclosed information is unavailing. For one thing, Brady applies even when the prosecutor has no knowledge of the existence of the information if it is known to police investigators. Kyles, 514 U.S. at 438. Moreover, it is clear that the prosecutor in this case was warned by crime laboratory personnel in November of 1986 that there was a potential problem with Phillips' performance at the Kirk Lord

workshop and his analysis of the hammer. The prosecutor was also warned that an internal investigation was likely to ensue.

The state's second argument is that even if defense counsel did not receive all of the documents and impeaching information available, they received a sufficient amount of information in sufficient time to use it in attacking Phillips' credibility with regard to his work at the Kirk Lord workshop. The state insists that Lord was accordingly not prejudiced by any failure to disclose information and that he has no basis for maintaining the existence of a Brady violation prejudicing his right to a fair trial.

In order to establish a Brady violation, Lord must show that the prosecution failed to disclose evidence material to guilt or punishment. United States v. Bagley, 473 U.S. 667, 674 (1985). Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. However, a showing of materiality does not require proof by a preponderance that defendant would more likely than not have received a different verdict with the undisclosed evidence, "but whether in its absence he received a

fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434.

The court has examined the documents that were provided to defense counsel during trial. They included information about Phillips spraying the hammer contrary to Sweeney's instructions. The documents also made it clear that Phillips had lied to Sweeney and had presented more than one inaccurate version of how he conducted his test of the hammer. Defense counsel was apprised of the fact that Phillips had falsified his report to Sweeney and that he had lost his job. With the information in the documents provided, defense counsel was able to explore Phillips' credibility and the reliability of his test results. The additional documents were essentially duplicative of information that defense counsel already had. Hence, the court finds that the failure to turn over the additional documents does not constitute a Brady violation.

ii. Hearings on admissibility of tests

At trial, Lord challenged the admissibility of much of the evidence about leuco-malachite testing in the Kirk Lord workshop on the grounds that spraying a premixed solution on samples was not a generally accepted technique in the

scientific community and any tests conducted in that manner should be excluded. The trial court held a hearing on this issue, applied the standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and denied the motion.

The trial court then held a second hearing at which she considered evidence relating to the admissibility of the particular tests which Phillips performed. Lord argues that the prosecution's failure to disclose information about Phillips and the internal investigation infected the trial court's rulings with error.

As to the first determination about the general acceptability of the spraying technique following a hearing held on June 2, 1987, this court rejects the argument that the undisclosed information would have made any difference. The Frye hearing was concerned with the acceptability of the technique. All of the internal investigation evidence went to the reliability of Phillips' results and not to the broader question about the technique. As the state argues, alleged infirmities in the performance of a particular test usually go to the weight of the evidence and not to its admissibility. State v. Kalakosky, 121 Wn.2d 525, 543, 852 P.2d 1064 (1993).

As for the second determination about the reliability of Phillips' testing in particular, the court finds that as of the date of the second hearing, June 8, 1987, defense counsel had sufficient information about Phillips to examine witnesses at the hearing.

iii. Cross-examination curtailed

Lord contends that the trial court deprived him of his Sixth and Fourteenth Amendment rights to confrontation and cross-examination by not allowing defense counsel to question Phillips about his violation of the codes of ethics of organizations to which he belonged, his use of anti-depressants, his psychiatric care and his vision from God about the hammer as the murder weapon.

The court finds no error of constitutional magnitude. Regarding Phillips' alleged breaches of the code of ethics governing forensic scientists, there was no evidence that any organization to which he belonged had sought to apply its ethical precepts to Phillips or dismissed him from its ranks for a breach of ethics. The trial court also properly disallowed any questioning on the general issue of whether Phillips had been under psychiatric care.

As for the more specific issue of whether Phillips had been taking medication at the time he went to the Kirk Lord workshop, the trial court allowed defense counsel to inquire about it. Phillips denied being on any medication, thus ending that line of questioning.[8] Therefore, it was Phillips' response and not the trial court's curtailment of cross-examination that ended the inquiry.

Lord argues that the prosecutor wrongfully failed to disclose information about Phillips' use of medication, but there is no showing that the prosecutor or the WSP knew about it in more than a general sense. Certainly, there is no evidence that anyone knew he was taking medication on the day of the tests performed in the Kirk Lord workshop.

Regarding Phillips' "vision from God" about the hammer as murder weapon, the trial court found that this evidence would be more prejudicial than probative. While the basis for this ruling is not entirely clear since the trial court did not specify what sort of prejudice would be suffered and to

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[8] However, in a deposition given in connection with this habeas corpus proceeding, Phillips testified that he was taking antidepressant medication on the day he went to the Kirk Lord workshop. This inconsistency does not make any difference to the outcome since Phillips also testified that the medications did not have any effect on his behavior.

whom, this court finds that even assuming the questioning should have been allowed, the fact that it was disallowed did not result in a fundamentally unfair trial.

iv. Deliberate destruction of evidence

Lord contends that he is entitled to a reversal of his conviction because of Phillips' deliberate destruction of evidence by spraying the hammer and other areas of the Kirk Lord workshop. Lord points to language in Sweeney's report and in documents coming out of the internal investigation indicating that Phillips deliberately sprayed the hammer. Lord argues that Phillips knew this would result in loss of evidence in that spraying consumes the sample being tested as well as often dislodging other trace evidence previously adhering to the sprayed surface.

The court finds no merit in this argument. There is no indication in the passages to which Lord refers that Phillips intentionally sought to destroy evidence. Instead the quoted passages refer to his intentional use of the spray as opposed to the dropper method of applying leuco-malachite green. Lord

has failed to make any showing of bad faith destruction of evidence.[9]

v. Phillips' educational background

Phillips testified at trial that he had a degree in chemistry, when his degree was actually in agriculture with a major in natural resources. Lord argues that this was an important issue because the type of forensic testing performed by Phillips required a sound knowledge of chemistry. Lord asserts that the prosecutor's failure to disclose Phillips' perjury is reversible error.

There is no evidence that the prosecution team itself knew of Phillips' misrepresentation of his degree. However, the WSP had reason to be aware of Phillips' educational background because it had conducted an investigation the year before of Phillips' falsification of his educational credentials when he applied to the WSP in 1970. Nevertheless, the court

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[9] Lord points to a statement in Sweeney's report concerning someone's third hand report that Phillips picked up the hammer and sprayed it at the Kirk Lord workshop. Aside from the problem of multiple levels of hearsay, the evidence before this court does not support this story. Detective Hudson testified at the evidentiary hearing that he did not see Phillips spray the hammer and that his knowledge of what happened came from Phillips, who said he sprayed the hammer by mistake as it was lying among some extension cords on the floor of the workshop.

finds that, even if this information had been disclosed to defense counsel, it would not have made any difference at trial. While Phillips did not have a chemistry degree, he had taken some college courses in chemistry and had 17 years of experience as a criminalist together with extensive experience in the use of leuco-malachite green.

b. Denial of trial continuance

On several occasions during the first few days of trial, defense counsel requested trial continuances because of new information about the results of laboratory testing on trace evidence and, in one case, the need to wait for additional test results based on the re-examination of certain evidence. These continuances were denied. Lord contends that he suffered prejudice because defense counsel were not able to prepare adequately for trial in the time allotted and because they had to delay opening statement until three days after the beginning of trial to wait for a test result.

The court finds that the record does not support Lord's contention that defense counsel were unable to adequately present his case to the jury because of insufficient time to investigate the lab results disclosed after the start of trial, or

because they had to delay opening argument until three days after the beginning of trial, or because they had insufficient time to conduct discovery about the internal investigation of Phillips.

c. Summary chart

During closing argument, the prosecution used an illustrative chart summarizing the physical evidence introduced in the case. Lord agrees that this chart was an appropriate aid when shown for demonstrative purposes during argument. However, the trial court went on to admit the chart as a trial exhibit and to allow its use by the jury during deliberations. Lord argues that this constitutes reversible error.

The chart in question featured a large grid which matched various locations key to the state's case with the types of physical evidence found there. Lord contends that the chart was extremely prejudicial because it was inaccurate, misleading, misrepresentative of the scientific testimony at trial and unduly emphasized the state's version of the case. The Washington Supreme Court found that the trial court erred in allowing the chart to go to the jury room, but went on to hold it was harmless error. 117 Wn.2d at 855-863.

Having reviewed Lord's claim about the summary chart, the court finds no basis for reversing the Washington Supreme Court's ruling. The Court's ruling on the chart was a determination by a state court on an evidentiary matter. Such a ruling is not reviewable by this court unless it rendered the trial so unfair as to have deprived the defendant of his constitutional right to a fair trial. The court finds that this was not the case. As the Court pointed out, the trial court gave an instruction to the jury limiting the use of the chart. The jury was permitted to take notes and had also heard extensive cross-examination of the experts whose testimony was summarized on the chart. Thus, defense counsel had an opportunity to explore the shortcomings in that testimony. Furthermore, the trial judge offered the defense an opportunity to make changes and corrections to the state's chart, which they did, and to offer a chart of their own.[10] Thus, although the chart should not have been allowed into the jury room during deliberations, it did not prejudice Lord's ability to present his case to the jury or to receive a fair trial.

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[10] Defense counsel on appeal did present a chart illustrating the differences between the state's version of the evidence and the defense version.

d. Admission of evidence

Lord challenges as erroneous the admission of several pieces of evidence including photographs of Tracy Parker's decomposed body, evidence of Lord's marijuana and alcohol use, and a photograph of Lord's arm showing a wound. The court finds no error.

According to the medical examiner who testified at trial, the photographs of Tracy Parker's body were helpful in explaining the depth and nature of the injuries leading to her death as well as illustrating the difficulties in assessing the injuries posed by the advanced state of decomposition of the body. Although the photographs were very unpleasant, they were also probative of elements which the prosecution had to prove and did not render the trial fundamentally unfair. See, Kealohapauole v. Shimoda, 800 F.2d 1463, 1465-66 (9th Cir. 1986).

As for the evidence that Lord smoked marijuana and beer, it was relevant and probative in view of testimony that Lord had been drinking beer on September 16, the evening of Tracy Parker's disappearance, and Lord's own later statement to a Kitsap County sheriff's detective that when he smoked

marijuana and drank beer, he became a different person and lost control.

Finally, with regard to the photograph of Lord's arm injury, there was testimony at trial that Lord had a wound on his arm on September 16. Even though the photograph was taken a month later, it was still relevant to that testimony and properly admitted.

2. Claims concerning informant testimony

a. Rex Harvey

i. Undisclosed deal

Rex Harvey was an inmate in the Kitsap County Jail at the time Lord was incarcerated there prior to Lord's trial, had access to Lord when he was appointed Lord's personal trustee, and testified at trial that Lord had made incriminating statements to him about his involvement in the murder of Tracy Parker. Lord contends that the prosecutor failed to disclose evidence of a deal between prosecutor Danny Clem and Rex Harvey for favorable consideration in return for his testimony at Lord's trial.

Harvey was questioned at the evidentiary hearing before this court, but did not reveal the existence of any deal.

He stated that he met with Clem once while he was still in jail and on several other occasions after he was released from jail in December of 1986 and was still on probation. Harvey testified that he told Clem of his unwillingness to testify and that Clem reminded him during each meeting of his probationary status. However, there was no evidence that Clem ever discussed or made any specific deal with Harvey in connection with Harvey's testimony at trial. Harvey averred that, after his testimony at Lord's trial, he was punished for his probation violations.

Based on the evidence adduced at the evidentiary hearing, the court finds no basis for Lord's claim that there was a deal with Harvey that the prosecutor failed to disclose.

ii. Massiah claim

Lord argues that the state violated the proscription set forth in Massiah v. United States, 377 U.S. 201 (1964), against intentional government solicitation of incriminating statements from a defendant in the absence of counsel. Lord contends that the state violated his right to counsel by giving Harvey the job of listening to Lord and reporting anything he said to jail authorities.

In Kuhlmann v. Wilson, 477 U.S. 436, 459 (1986), the United States Supreme Court held that "a defendant does not make out a [Sixth Amendment violation] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police." Id. The Court held that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." Id.

At the evidentiary hearing before this court, Harvey denied having ever questioned Lord or talked to him about the Tracy Parker murder. Harvey testified that Lord's statements were volunteered comments and that he did not solicit, respond to or encourage them in any way. The court finds no basis for a Massiah violation.

iii. Conflict of interest

Lord contends that he received ineffective assistance of counsel because of the existence of a conflict of interest on the part of co-counsel Ronald Ness.

Lord was charged with murder in the first degree on October 3, 1986. His original counsel, Mark Yelish and

Richard Peterson, were disqualified from representing him by order of the trial court on November 24, 1986 on the grounds that their law firm had previously represented Sonny Belgard. Because the prosecutor was planning to call Belgard as a witness against Lord, the court found a conflict of interest. Ron Ness was appointed in place of Yelish and Peterson; co-counsel Judith Mandel later joined Ness in representing Lord.

On February 24, 1987, Ness received notice that the prosecutor had decided to call Rex Harvey to testify against Lord. Shortly thereafter, Ness filed a motion asking for court permission to continue representing Lord even though he personally had represented Rex Harvey recently in connection with some theft charges. Ness indicated that Rex Harvey had signed a written waiver of the attorney-client privilege as to any communications he had made to Ness or any advice Ness had given to him in the course of representing him.

The trial court held a hearing and granted Ness' motion. Although the court was aware of Rex Harvey's waiver, the court nevertheless ordered Ness to turn over all of his files to either Harvey's new attorney or to the clerk of court. The court also ordered co-counsel Judith Mandel to handle Harvey's

cross-examination at trial and barred Ness from consulting with Mandel about Harvey or disclosing any information which he had received in the course of representing him.

Lord was not consulted during this hearing nor is there any mention in the record that he was apprised of the issue. At his deposition taken in this matter, Ness confirmed that there was no verbal waiver of any conflict of interest by Lord because Ness and Mandel "didn't feel that it was necessary for Mr. Lord to waive any, so we never even addressed the issue." In a declaration to this court, Lord averred that his attorneys never explained to him the nature of Ness' conflict or asked him whether he wished to waive his right to representation by a lawyer without conflicts. He further averred that his attorneys never checked with him to determine his position before, during or after the time Ness filed his request to remain in the case.

In keeping with the trial judge's order, Mandel interviewed Harvey and conducted his cross-examination during the guilt phase of the trial. However, Ron Ness gave the closing argument during that phase and discussed Harvey's testimony briefly.

Lord contends that Ness' conflict of interest resulted in ineffective assistance of counsel. Lord points out that between February 24, 1986 and October 24, 1986, Ness made numerous appearances on behalf of Harvey as well as filing omnibus motions and a sentence reduction motion.

Based on Harvey's deposition testimony given in 1995 in conjunction with this habeas proceeding, Lord also emphasize s that sometime between September 30 and December 12, 1986, Harvey met with Ness in the Kitsap County jail for 15 or 20 minutes at Harvey's request to discuss being a personal trustee to Lord. Harvey averred in his deposition that he had been asked to do so by jail personnel and wanted Ness' counsel on how he should handle the situation. According to Harvey, Ness told him he should do what the jailers told him to do. Harvey further indicated that he told Ness during a conversation with Ness at the jail that he, Harvey, knew Tracy Parker and her family.

Conflicts of interest can arise both in cases of simultaneous and successive representation. Although the time line in this case is a little hazy because of Harvey's uncertainty

about when he met with Ness in the Kitsap County jail,[11] the court will assume that this is a case of successive representation.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel unimpaired by a conflict of interest. United States v. Wheat, 813 F.2d 1399, 1402 (9th Cir. 1987), aff'd on other grounds, 486 U.S. 153 (1988). In order to establish a Sixth Amendment violation based on conflict of interest, a criminal defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance. Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir. 1994). Once an actual conflict is established, prejudice is presumed because the harm may not only consist of what counsel does, but of what counsel refrains from doing. Id. (citing Holloway v. Arkansas, 435 U.S. 475, 490 (1978).

In cases of successive representation such as this one, "conflicts of interest may arise if [the] cases are substantially related or if the attorney reveals privileged communications of

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[11] Ness was appointed to represent Lord on November 24, 1986, while Harvey averred that he met with Ness in the Kitsap County Jail sometime between September 30 and December 12, 1986.

the former client or otherwise divides his loyalties." Thomas Municipal Court of Antelope Valley Judicial District of California, 878 F.2d 285, 288 (9th Cir. 1989) (quoting Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.), cert. denied, 488 U.S. 908 (1988).

A substantial relationship exists if the factual contexts of the two representations are similar or related. Thomas, 878 F.2d at 288. If there is a reasonable probability that confidences were disclosed which could be used against the former client in the later proceeding, a substantial relationship will be presumed. Id.

In this case, a substantial relationship did exist between Ness' representation of Harvey regarding criminal charges and convictions which could later serve as impeachment material during cross-examination of his testimony against Lord. The same must be said for Harvey's disclosures to Ness about being asked to serve as a personal trustee for Lord and Harvey's relationship to the Parker family.

The state responds that there was no prejudice to Lord because Harvey signed a waiver of the attorney-client privilege, thus freeing Ness from the conflict of interest arising

out of his divided loyalties to Harvey and to Lord. The court finds that the state is correct.

Moreover, the court finds no prejudice to Lord resulting from Ness' representation of him. If Ness had been removed from the case, his successor would not have been privy to the information about Harvey which Ness allegedly had as a result of representing Harvey in the past and thus could not have used it to Lord's benefit. Lord was also represented by co-counsel Mandel, who had no prior attorney-client relationship with Harvey and suffered from no impediment to vigorous representation of Lord's interests. Furthermore, during his testimony before this court, Ness failed to present any information which he could have offered at the trial that the trial court's ruling prevented him from using.

iv. Limit on cross-examination and impeachment

Lord contends that the trial court wrongfully denied defense counsel additional time to cure the prosecutor's failure to disclose that in addition to various prior theft convictions, Rex Harvey had several misdemeanor convictions for unlawful issuance of bank checks. Lord was not able to cross-examine

Harvey about those additional convictions nor was he permitted to introduce the testimony of Ronald Heeney as to Harvey's reputation for truthfulness.

The court finds no error. The jury was made aware that Harvey had eight prior theft convictions accomplished by color or aid of deception; cross-examination as to some additional misdemeanor bad check convictions would have added nothing important to the jury's knowledge of Harvey's propensity for dishonesty.

As for Ronald Heeney's proposed testimony, the trial court was correct in excluding it. Heeney was one of Harvey's theft victim who testified that he spoke to three other people in 1985 about Harvey's business dealings. Defense counsel's offer of proof revealed that Heeney was not aware of Harvey's reputation for truthfulness in the general community. Furthermore, given the testimony already before the jury about Harvey's dishonesty leading to numerous criminal convictions, Heeney's testimony would have been merely cumulative.

b. Robert Machinski

Robert Machinski was an acquaintance and co-worker of Lord's who testified at trial that he and Lord had used an

orange U-Haul blanket at the Kirk Lord workshop the day before Tracy Parker's disappearance, that Lord had rubbed grease into the workshop floor a few days later, and that Lord had offered him inducements to change his statement to the police about the U-Haul blanket.

Machinski had been convicted in Texas in 1983 of a felony burglary charge. However, at trial he contended that his probation had been dismissed and that he had received a certificate of rehabilitation at the end of his four-year probationary period. Defense counsel apparently accepted Machinski's contention that his conviction had been in some manner pardoned or annulled and did not cross-examine him about it.

Lord argued in his motion for evidentiary hearing that there was no proof of any certificate of rehabilitation and that the only documentation available implied that the Texas probation had been dismissed because Machinski was a witness in the Lord murder trial. Lord requested an evidentiary hearing on the issues of whether Machinski still had a conviction of record in Texas and on whether the prosecutor in Lord's case

had any influence on the disposition of Machiniski's case by the Texas court.

The court has not been presented with any further evidence or argument about Machinski's Texas conviction. Lacking any basis to conclude that Machinski's representation at trial about the status of his criminal record in Texas was incorrect or that the prosecutor was involved, the court finds no merit in Lord's argument.

c. Gerald Belgard

i. Exclusion of character evidence

Gerald Lee "Sonny" Belgard was imprisoned in the same jail with Lord during the period preceding Lord's trial and testified at Lord's trial that Lord had confessed to him on several occasions in 'hypothetical" terms that Lord had hit Tracy Parker on the head with a hammer or mallet, panicked, left, came back and wrapped her body in a blanket, threw it in the back of his truck and dumped it.

In response, defense counsel offered the testimony of three witnesses regarding Belgard's poor reputation for truthfulness. All three proposed witnesses were community corrections officers with the Washington Department of

Corrections who knew Belgard only as a result of his criminal behavior. After hearing offers of proof, the trial court excluded their testimony on the grounds that none of them had any knowledge of Belgard's reputation for honesty and veracity in the general community as opposed to the criminal justice system.

Lord argues that the trial court erred in excluding the officers' testimony because evidence about Belgard's reputation in the community of other criminal offenders, law enforcement and corrections officers is competent reputation testimony within the meaning of State v. Land, 121 Wn.2d 494, 851 P.2d 678 (1993). In Land, the Washington Supreme Court substituted a flexible, functional approach to determining a relevant community for the previous more restrictive adherence to the community of residence approach set forth in State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963).

Having reviewed the offers of proof, the court concludes that the trial court exercised its discretion appropriately in excluding the evidence. As the trial court noted, one proposed witness's contacts were remote and limited, another had no opinion about Belgard's reputation for

truth and honesty among the people she had contacted, and the third only cited specific, limited instances and had no general knowledge about his reputation. Even assuming that the criminal justice system might form a relevant community, these witnesses had insufficient knowledge to satisfy the standard for admissible testimony. Certainly, the failure to admit their testimony did not constitute a denial of due process.

ii. Failure to call impeachment witnesses

Prior to Lord's trial, a defense investigator interviewed Robert Aldrich, who stated that Sonny Belgard had admitted to him that he, Belgard, had made up the story about Lord's confessional statements so that he could keep from going to prison. Lord challenges as erroneous defense counsel's decision not to call Aldrich to testify at trial. In addition, Lord names three other potential witnesses who allegedly would have discredited testimony offered by jailhouse informants Sonny Belgard, Rex Harvey and Tom Demars.

The court agrees with the state that Lord's claim about the three additional witnesses is procedurally barred. While Lord may have briefly mentioned the issue in a pro se brief filed on direct appeal, he did not provide any details which

would have permitted the Washington Supreme Court to assess the merits of his contention. Even assuming that the claim were not barred, this court has no idea what the witnesses would say and no basis for ruling on the claim.

Likewise, Lord has not pursued his contention about Robert Aldrich. Because Aldrich did not testify at the evidentiary hearing, the contention that he could have provided valuable evidence is merely hearsay.[12]

iii. Failure to disclose deal

Lord alleges that the prosecution made a deal with Belgard in exchange for his testimony which it failed to disclose to Lord's counsel. Having held a hearing on this claim, the court finds that Lord failed to substantiate it. Belgard himself denied the existence of any deal. The only evidence of a deal came from the testimony of his wife at the time, who stated that he told her he had a deal with the prosecutor. However, she did not know what this alleged deal

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[12] The state also points out that defense counsel called another prison inmate, Blaine Whitehead, at trial. He testified that Belgard had told him that Belgard was testifying against Lord to try to get some special privileges. Thus, Belgard's motivation for testifying against Lord did not go entirely unchallenged or unexamined at trial.

involved. Vague hearsay is not a sufficient basis for finding that the prosecutor failed to disclose a deal with Belgard.

3. Other claims from guilt phase

a. Jury instructions

First, Lord contends that Instruction 13 was fatally flawed because it allowed the jury to convict him of aggravated murder if it found as an aggravating factor crimes which are not valid aggravating factors under RCW 10.95.020(9).

Lord's contention is unfounded. Instruction 13 provided that, if the jury found Lord guilty of premeditated first degree murder, then the jury must consider whether the state had proved the existence of one or more aggravating circumstances beyond a reasonable doubt. The instruction went on to list five separate circumstances, including murder committed to conceal the commission of the crimes of second degree kidnapping or attempted kidnapping or to protect or conceal the identity of a person committing those crimes. It is true that these crimes are not among those listed in RCW 10.95.020(9), but they are included under RCW 10.95.020(7). That section provides that a person is guilty of aggravated first degree murder if he or she commits first degree murder to

conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.

As the state emphasizes, RCW 10.95.020(7) does not specify the type of crime. Thus, Instruction 13 is actually more specific than required by that statutory provision without being erroneous.

Second, Lord argues that Instruction 13 concerning aggravating factors erroneously fails to insure jury unanimity as to which underlying crime was committed. Lord concedes that jury unanimity about the specific crime is not required for purposes of RCW 10.95.020(9). State v. Jeffries, 105 Wn.2d 398, 419-20, 717 P.2d 722 (1986); See also Jeffries v. Blodgett, 5 F.3d 1180, 1195 (9th Cir. 1993). However, he insists that it is required under RCW 10.95.020(9). Lord cites no authority for this contention. The court finds no merit in this argument.

Third, Lord asserts that the jury instructions allowed the jury to double count the fact that the murder occurred in the course of a felony as both an element of the crime of conviction and an aggravating factor weighing in favor of

death, thus failing to narrow sufficiently the class of criminals subject to the death penalty.

The express language of Instructions 12 and 13 fails to bear out Lord's contention. Instruction 12 asks the jury to decide whether defendant is guilty of premeditated first degree murder and two alternative formulations of first degree felony murder. Instruction 13 then specifically provides that only if the jury finds defendant guilty of premeditated first degree murder is it to go on to consider the existence of aggravating circumstances. Thus, if the jury found defendant guilty only of felony murder, it would not reach the issue of aggravating circumstances presented in Instruction 13. The double counting alleged by Lord is accordingly not a problem.

b. Insufficiency of evidence

Lord contends that there was insufficient evidence of premeditation and of the aggravating factors of witness-killing and first degree kidnapping to support his conviction. Having reviewed the evidence presented at Lord's trial, the court finds no merit in these contentions.

As the state points out, the standard is whether any rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Viewing the evidence in the light most favorable to the prosecution, as the court must, it is clear that a rational trier of fact could have found premeditation, a witness-killing factor and first degree kidnapping based on evidence that Lord took Tracy Parker to Kirk Lord's workshop so that he could engage in criminal activity undisturbed, that he rendered her unconscious with a blow from behind, that he then raped her, and finally killed her in order to prevent her from reporting his criminal behavior in kidnapping and raping her. Contrary to Lord's argument, it is not necessary for kidnapping to be accomplished by force in order to constitute kidnapping in the first degree. Pursuant to RCW 9A.40.010(l), deception is sufficient. Moreover, the evidence preferred by the state was that Tracy Parker was kept in Kirk Lord's workshop by force.

Lord also asserts that the record contains insufficient evidence of the reliability of the scientific tests used by state criminalists to link him to the charged crimes.[13] The court

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[13] The state argues that this claim is procedurally barred because Lord did not present it to the Washington Supreme Court on the same factual and legal grounds as it is now presented. In his personal restraint petition, Lord alleged that there was insufficient evidence to establish the reliability of the scientific results presented at trial. Although he did not

finds no merit in this claim. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a reasonable jury to have concluded that Lord was guilty of the crimes charged.

c. Absence of Lord from hearings and sidebars

Lord was absent from a pretrial hearing an April 28, 1987 and from a day of pretrial motions on May 20, 1987 after the jury had been sworn. According to Lord, he was also not present during numerous meetings between the trial judge and counsel in chambers, at numerous side bars during trial and during the trial judge's phone conferences with WSP counsel John Vercimak. Except for the May 20 hearing, Lord was never asked whether he wished to waive his presence at these hearings, side bars and conferences. Although he did waive his presence on the record as to the May 20 hearing, Lord argues that it was insufficient because he was not adequately advised of his rights.

The state does not dispute Lord's constitutional right to be present at every stage of his trial. United States v. Gagnon,

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specifically argue that the evidence was insufficient to prove his identity, the court finds that he sufficiently raised the issue in state court.

470 U.S. 522, 526 (1985). Nevertheless, a defendant does not suffer a deprivation of due process unless defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Id. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 108 (1934)). Only if defendant's absence would deprave him or her of a fair and just hearing does a due process right apply. Id.; Siripongs v. Calderon, 35 F.3d 1303, 1321 (9th Cir. 1994). In addition, a defendant can waive his or her right to be present by voluntary absence.

While Lord appears to have been absent from numerous proceedings before and during trial, he does not demonstrate how any of these absences were prejudicial to his defense. The court's review of the record indicates that the hearings, conferences and side bars in question involved legal, procedural or administrative matters. Lord does not provide any evidence or argument to the contrary. As Gagnon indicates, Lord must make a showing that his absence somehow deprived him of a fair and just hearing. Lord has not shown any such prejudice.

d. Exclusion of alternate suspect evidence

Lord asserts that he was wrongly denied the opportunity to introduce evidence tending to implicate alternate suspects. For example, he preferred testimony that Tracy Parker's neighbor owned a blue pickup truck,[14] that Tracy Parker had told a friend she was concerned about being followed by someone in a car, and that other witnesses had access to the key, the U-Haul blanket and the residence where the victim was seen. Lord further contends that he was not allowed to challenge the alibis of these other witnesses.

The court finds that Lord failed to establish an adequate foundation for the alternate suspect evidence. In order to be admissible, the evidence must do more than simply raise a vague suspicion about the possible culpability of someone other than the defendant. Instead, "it must he coupled with substantial evidence tending to directly connect that person with the actual commission of the offense. "People of Territory of Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993)

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[14] Lord argues that this was significant because the pickup truck which Lord was alleged to have used during the course of the crime was blue and, at trial, the state introduced blue car paint found on clothes and sites associated with the victim.

(quoting Perry v. Rushen, 713 F.2d 1447, 1449 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984) (emphasis in original). None of the evidence preferred by Lord does more than raise suspicion.

e. Jury selection issues

i. Change of venue to Pierce County

Before trial, defense counsel moved for a change of venue from Kitsap County based on extensive pretrial publicity. The trial court granted the motion in part, holding that the jury should be selected from Pierce County. Lord now asks the court to make an independent review of the record in order to determine whether the prejudice against defendant was so great that he could not receive a fair trial. Bashor v. Risley, 730 F.2d 1228, 1234 (9th Cir.), cert. denied, 469 U.S. 838 (1984).

The court finds no indication that pretrial publicity so infected the potential jury pool in Pierce County with prejudice against defendant that it was impossible for him to be fairly tried. As is usually the case, most of the media attention occurred in the immediate aftermath of the crime and Lord's arrest in September of 1986. Jury selection did not occur until

May of 1987. The voir dire process did not reveal any deepseated, enduring prejudice. Indeed, few of the prospective jurors remembered any details about the case. Lord does not point to any actual prejudice, and the court finds no basis for presuming prejudice.

ii. Inquiry into jurors' attitudes

Lord alleges in his petition for writ of habeas corpus that the trial court improperly limited inquiry into jurors' attitudes about the presumption favoring a life sentence. Lord has not filed any additional briefing or otherwise pursued this contention. The court finds no merit in it.

iii. Failure to grant challenge for cause

During voir dire, one of the prospective jurors indicated that a person convicted of premeditated murder deserves the death penalty. Lord takes issue with the fact that the trial court denied a challenge for cause, contending that this denial was constitutional error. Wainwright v. Witt, 469 U.S. 412 (1985).

As the state points out, Lord removed that juror with a peremptory challenge.[15] Thus, even if the trial court

[15] The court notes that Lord did not use all of his peremptory challenges nor did he later request a second change of venue.

committed error, it did not prejudice Lord during his trial. Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

iv. Defense failure to challenge jurors

Lord contends that defense counsel committed error by failing to challenge for cause two jurors committed to voting for the death penalty.

Having reviewed the voir dire examination of the two jurors, the court finds no merit in Lord's claim. While the jurors both stated that they believed individuals convicted of committing certain types of crimes should receive the death penalty, they also averred that they could listen to the court's instructions on the law, put aside personal feelings which conflicted with the law, and be fair and impartial jurors. Challenges for cause against these two jurors would not have been successful.

v. State's use of peremptory challenge

During jury selection, the prosecutor used peremptory challenges to remove any prospective jurors who expressed opposition to the death penalty. Lord argues that this denied

him his right to a jury representing a fair cross-section of the population.

Discriminatory exercise of peremptory challenges to exclude jurors based on race and gender is prohibited by the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. 400 (1991); Georgia v. McCollum, 505 U.S. 42 (1992); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). However, Lord does not cite any authority, nor is the court aware of any, holding that persons opposed to the death penalty constitute a cognizable group for purposes of an equal protection challenge to jury composition. To the contrary, Brown v. Dixon, 991 F.2d 490 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990), rejected a similar argument. The court finds no basis for Lord's contention.

vi. Juror Misconduct

One juror was-asked three times, twice through direct oral questions and once in the jury questionnaire, whether he had read any news account of the Tracy Parker murder. Each time he responded no. After the trial, however, he indicated to a defense investigator that he had read accounts of the murder in the Tacoma News Tribune for which he worked as a

pressman at the time. Lord contends that defense counsel would have had a basis for a challenge for cause if the juror had answered truthfully during the voir dire process.

The state responds that there is no proof of the juror's untruthfulness at the time he made the statements because all he said during voir dire was that he did not remember having read anything about the case. Moreover, he told the investigator that he had not formed any opinion about the case before trial because he had no in-depth information. The state argues that an individual does not become ineligible to serve as a juror simply because he or she has heard or read something about a case. Murphy v. Florida, 421 U.S. 794 799 -800 (1975). Only if a person cannot set aside any opinion or prejudgment of the case must he or she be disqualified. Irvin v. Dowd, 366 U.S. 717, 723 (1961).

In this case, the juror's limited exposure to media reports and sketchy knowledge of the case would not have been a basis for a challenge for cause. There is no merit in Lord's claim.

f. Prosecutorial misconduct

In his petition for writ of habeas corpus, Lord alleged certain instances of prosecutorial misconduct in closing argument and concerning certain motions in limine. However, he has not pursued them in any subsequent briefing. The court finds no merit in them.

Lord also alleges that prosecutor Danny Clem engaged in improper contact with Lord in the courtroom during trial by engaging in certain vulgar exchanges with him.[16] Even assuming that some exchange of words occurred, there is no evidence that the jury ever witnessed anything and thus no evidence of any prejudice to Lord.

g. Duplicity of amended information

The amended information in this case contained a single count charging Lord with two separate crimes, aggravated first degree murder and first degree felony murder. The state concedes that the information suffered from duplicity.

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[16] This allegation is based on a local newspaper article reporting on a speech given by Clem at a Rotarian meeting in which he claimed to have exchanged vulgar remarks with Lord on several occasions after court rulings.

However, duplicity does not constitute reversible error unless Lord was prejudiced by lack of clear notice about the crimes with which he was charged which prevented him from preparing his defense or by the jury's failure to reach a unanimous verdict on the commission of a particular offense. See United States v. Aguilar, 756 F.2d 1418, 1420 n.2 (9th Cir. 1985).

The court finds that Lord was subjected to neither form of prejudice in that he had clear notice of the charges against him and the jury reached a unanimous verdict on all three alternative means of committing first degree murder listed in Instruction 12 and Verdict Form A.[17]

h. Denial of effective assistance of counsel during guilt phase

Lord alleges that defense counsel at trial denied him effective assistance of counsel in several respects. The applicable test is set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that

[17] These included premeditated first degree murder (Alternative A), felony murder - rape (Alternative B) and felony murder - kidnapping (Alternative C).

> counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

With this standard in mind, the court will review Lord's claims of error.

The contention which Lord argues the most vigorously is his claim about defense counsel's failure to call as trial witnesses three young men who claimed to have seen Tracy Parker alive on September 17, 1986, the day after she was allegedly killed by Lord. Having carefully reviewed all of the documentary evidence submitted on this claim and having heard the testimony of the three witnesses as well as the opinion of Lord's expert witness, the court concludes that the decision not to call them was a reasonable strategic choice which did not amount to ineffective assistance of counsel. Defense counsel reasonably could have found sufficient discrepancy among the witnesses' various accounts, sufficient uncertainty in their memories and sufficient question about the accuracy of their identification as well as the date on which the event happened to decide not to call them as witnesses.

Defense counsel could also reasonably have been concerned that these discrepancies and inconsistencies together with facts concerning the witnesses' drinking and drug usage might reflect poorly on the defense.

As for Lord's other claims, the court has already considered most of them, at least in part, earlier in this opinion. The court finds no failure on the part of defense counsel to adequately investigate and prepare the case for trial. Since the court found no merit in Lord's claims about informant testimony from Harvey and Belgard or about the failure to call witnesses to impeach Belgard, there is no basis for an ineffective assistance of counsel claim.

Lord criticizes defense counsel's failure to present demonstrative evidence illustrating the shortcomings of the state's case in response to the state's summary chart. This failure does not rise to the level of ineffective assistance of counsel.

As for delaying opening statement until after several witnesses had testified, the court finds that defense counsel had good reason to wait for additional laboratory results before outlining Lord's case to the jury. Likewise, the court concludes

that the closing argument was a reasonable presentation of Lord's case and that Ron Ness did not engage in ineffective assistance of counsel by conceding Lord's contact with the blanket.

Ness' absence from the state's rebuttal closing argument was at Lord's own, clearly expressed request. Moreover, co-counsel Mandel was present. She had participated in all phases of trial and was fully familiar with the case, so Lord was not prejudiced.

The court finds no error in defense counsel's handling of the evidence concerning matchbooks[18] or failure to object to alleged prosecutorial misconduct during closing argument.

i. New evidence about blood on wood chips and hammer

While Lord's case was on appeal before the Washington Supreme Court in 1992, the Court appointed an expert, Dr. Blake, to re-examine certain pieces of evidence. In his report, Dr. Blake indicated that he found no blood on Exhibit 97C,

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[18] The state introduced evidence that two similar matchbooks were found, one at the site of Tracy Parker's clothes and one in the blue pickup truck which Lord had been driving on the night of September 16, 1997. Lord argues that defense counsel were remiss in not introducing evidence that 31 million of these matchbooks had been distributed in Washington.

wood chips from the door of the Kirk Lord workshop which had earlier been determined by Mike Nolan of the Washington State Crime Laboratory to have tested positive for 0-type blood. Dr. Blake also found no blood on the hammer and opined that the spraying of the hammer had been wholly inappropriate. Lord claims that this is newly discovered evidence which warrants a new trial.

The state first responds that Lord's claim is procedurally barred because, although he raised the issue before the Washington Supreme Court as a matter of state law, he did not allege any federal constitutional violation. The state contends that in order to exhaust a habeas corpus claim, petitioner must alert the state court to the existence of a federal claim. Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

The court agrees that Lord failed to exhaust this claim and is barred from raising it. Even assuming that it was not barred, the court would find no merit in it because none of Dr. Blake's findings represent new evidence. Before Lord's trial, the defense was advised that the blood sample on Exhibit 97C was so small that testing by the WSP Crime Laboratory would probably use up the sample. The defense was accordingly

invited to have an expert attend the test. Ray Davis observed Mike Nolan's testing procedure on behalf of the defense and found no error in it. Thus, Dr. Blake's finding that Exhibit 97C contained no blood is not a new relevation and was in fact the expected result.

As for the hammer, the results of every test for blood except Phillip's initial spraying with leuco-malachite green has had negative results. Nor is Dr. Blake's opinion about the use of a spraying technique new. Both Dr. Thornton and Kay Sweeney testified about the drawbacks of spraying leuco-malachite green at trial. While their conclusions may not have been as emphatic as Dr. Blake's, that does not make Dr. Blake's opinion new evidence.

C. Penalty Phase Claims

1. Jury instructions

a. Improper emphasis on unanimity

In Mak v. Blodgett, 970 F.2d 614, 624-25 (9th Cir. 1992), the Ninth Circuit held that the trial court's jury instructions and the verdict form combined to improperly suggest that unanimous agreement was required not to impose the death penalty. In particular, the Ninth Circuit singled out

instruction number 6 as an erroneous statement of the law. That instruction provided in relevant part:

> You must answer one question. All twelve of you must agree before you answer a question "yes" or "no". When all of you have agreed, fill in the answer to the question in the verdict form to express your decision. . .

Lord contends that the penalty phase instructions given in his case were similarly flawed. It is true that instructions 2 and 3 and the verdict", form were identical in all relevant portions to those in Mak. However, instruction 6 not only contains the same language as instruction 6 in Mak, but also the following additional language: "if you do not unanimously agree then answer unable to unanimously agree." Thus, the impermissible emphasis on unanimity found in instruction 6 of Mak is eliminated. The court finds that no juror in Lord's case could have been misled by the jury instructions into concluding that unanimity was required in order to reject the death penalty.

b. Confusion elicited by jury instructions

Lord contends that the jury instructions in the penalty phase were so confusing that the jury could not understand them and was left to exercise its unchanneled discretion. Having reviewed the jury instructions and the expert

declaration submitted by Lord in support of this contention, the court finds no merit in this argument. While the jury instructions may have been complicated, they were sufficiently comprehensible to inform and guide the jurors as to the applicable law.

c. - "Any relevant factors"

Penalty phase instruction 3 told the jury that "[in] deciding the question posed, the jury may consider any relevant factors." As Lord points out, this language has been construed by the Washington Supreme Court to mean that the jury's liberal consideration is limited to mitigating factors; as to aggravating factors, the jury can only consider statutory ones. State v. Bartholomew, 101 Wn.2d 631, 642, 683 P.2d 1079 (1984). Lord argues that the instructions in his case were not so limited and that the jury may have been misled about its role.

Having reviewed the penalty phase instructions as a whole, the court is convinced that the jury understood its role in deciding the penalty to be imposed on Lord. Cf. Jeffries v. Blodgett, 5 F.3d 1180, 1196 (9th Cir. 1993), in which the Ninth Circuit considered a similar challenge and found that the "any

relevant factors" language was not ambiguous when read in context with the rest of the instructions.

d. Single mitigating circumstance

Penalty phase instruction 3 told the jury to impose death if it found "that there are not sufficient mitigating circumstances to merit leniency." Lord argues that this language prevented the jury from considering a single mitigating factor as sufficient to merit leniency.

Again viewing the penalty phase instructions as a whole, the court finds that there is no possibility the jury could have reached the conclusion suggested by Lord. The jury was clearly told that the prosecution had the burden of proof. Moreover, in instruction 5, a mitigating circumstance was defined as a fact which justifies a sentence of less than death.

e. Statutory presumption of leniency

Lord assigns as error the trial court's refusal to give defense counsel's proposed presumption of leniency instruction. Washington law does not require such an instruction. State v. Mak, 105 Wn.2d 692, 756, 718 P.2d 407 (1986). In light of the fact that the jury was adequately

instructed about the state's burden of proof in the penalty phase, the court concludes that Lord's argument has no merit.

2. Admission of prior California juvenile adjudication as conviction

When Lord was fourteen years old, he was found guilty of second degree murder arising out of the death of a family friend and made a ward of the court. There is no dispute that under California law, this constituted a juvenile adjudication and not a criminal conviction. United States v. Sanders, 41 F.3d 480, 486 (9th Cir. 1994).[19]

Under Washington state law governing the penalty phase of capital punishment cases, the prosecution can only introduce as nonstatutory aggravating factors in its case in chief, evidence that would have been admissible during the guilt phase and the defendant's criminal record. RCW 10.95.060; State v. Bartholomew I, 98 Wn.2d 173, 197, 654 P.2d 1170 (1982), aff'd in part, State v. Bartholomew II, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984). The admissible criminal record is in turn limited to convictions and does not

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[19] However, as Sanders goes on to say, a juvenile can only be declared a ward of the court as a "law violator" after the state proves beyond a reasonable doubt that he or she has violated a criminal law. 41 F.3d at 486.

include evidence of other crimes of which defendant has not been charged or convicted. Id.

Lord argues that because his juvenile adjudication does not qualify as a conviction under California law, it was error to allow its introduction during the penalty phase of his trial. Respondent contends in turn that this is an issue of state law not cognizable in this habeas corpus proceeding.

The state emphasizes that the Washington Supreme Court rejected Lord's claim as a matter of state law in its decision on his personal restraint petition. The Court acknowledged the ruling in Bartholomew, but found that the use of the word a convictions' was meant to distinguish between mere allegations of criminal activity and actual adjudications of guilt, not between adult convictions and findings of quilt in juvenile proceedings.[20] 123 Wn.2d at 310-22. Specifically, the court cited to In re A.B.C.D.E, 121 Wn.2d 80, 87, 847 P.2d 455 (1993), in which juvenile court adjudications were treated as equivalent to convictions for

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[20] Lord asserts that the Washington Supreme Court was creating new law in its ruling on the scope of Bartholomew. The state responds that it was merely construing the meaning of the Bartholomew decision as applied to a particular set of facts. The court finds the state's argument persuasive.

purposes of a statute requiring HIV testing of all persons convicted of a sexual offense. In reaching its decision in In re A.B.C.D.E, the Court reviewed a number of statutory provisions in which juvenile court adjudications were equated with convictions.

In order to establish a habeas corpus claim, Lord must establish that there has been a violation not just of state law, but of federal law. 28 U.S.C. § 2254(a). Lord contends that introducing his juvenile adjudication violated his right to due process. He stresses that the hearing was closed, there was no right to jury trial and he apparently was not informed of a right to appeal at the close of the hearing. On the other hand, Lord did have a right to counsel, to cross-examine witnesses, to present evidence on his behalf and to refrain from testifying. The record does not reveal that Lord was denied any process due under the law governing California juvenile adjudications. Thus, his case is easily distinguishable from Johnson v. Mississippi, 486 U.S. 578 (1988), in which the prosecutor sought to rely on a conviction which had been reversed, or People v. Terry, 61 Cal.2d 137, 148, cert. denied, 379 U.S. 866 (1964), in which the conviction in question had been pardoned.

In Johnson and Terry, therefore, no convictions existed on the record. In this case, by contrast, there is no dispute that Lord was found guilty of second degree murder in a juvenile adjudication conducted in keeping with the requirements of California law.

Lord contends that the state is not honoring the Full Faith and Credit Clause, U.S. Const., Art. IV § 1, by admitting Lord's juvenile adjudication in a death penalty proceeding because it would not be admissible under California law. Lord is correct that a juvenile adjudication is not admissible as a prior conviction in California. People v. Frierson, 53 Cal.3d 730, 747 (1991); People v. Burton, 48 Cal.3d 843, 861 (1989). However, Lord's juvenile adjudication for second degree murder would be admissible in the penalty phase of a capital proceeding under California law under the category of criminal activity involving force or violence. Thus, Lord is not correct that his prior California adjudication would be inadmissible in a California capital case.

Finally, Lord points out that the prosecutor referred to his juvenile adjudication as a conviction before the jury. The state agrees that this was not a correct description. However,

the jury was aware that the murder was committed while he was a juvenile and the court concludes that this error was harmless.

3. Impremissibly broad cross-examination

Lord asserts that error occurred as a result of the prosecutor's impermissibly broad cross-examination of his father. Whatever the merits of this contention, it raises only issues of state law which are not cognizable in this federal habeas corpus proceeding.[21]

4. Failure to grant continuance of penalty phase

On November 24, 1986, the information charging Lord with first degree premeditated murder was amended to charge aggravated first degree murder. Defense counsel Ron Ness protested at the time that he needed more time to prepare for a death penalty case. The trial court responded that, if necessary, there could be a reasonable delay granted between the guilt and the sentencing phases of the trial.

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[21] Lord's invocation of Ballard v. Estelle, 937 F.2d 453, 456 (9th Cir. 1991), is inapposite. While the Ninth circuit did hold that state laws can give rise to liberty interests protected by the Fourteenth Amendment, all of the examples given involve state sentencing laws. None of them involve state evidentiary laws applied during the course of trial.

The jury returned a verdict of guilty against Lord on Saturday, July 18, 1987. The penalty phase began on Thursday, July 23, 1987. Defense counsel requested but were denied a longer continuance. Lord contends that this denial prejudiced defense counsel's ability to prepare for the penalty phase. In particular, Lord argues that defense counsel were unable to present all of the mitigating evidence available or to adequately prepare the witnesses whom they did present.

Based on the evidence before it, this court finds that the reason for defense counsel's decision not to present more witnesses and evidence at the penalty phase was Lord's own reluctance to allow them to do so. The court finds no indication that the witnesses whom defense counsel did present we-re inadequately prepared.[22]

5. Prosecutorial misconduct in closing argument

Lord takes issue with several portions of the prosecutor's closing argument. First, he contends that the

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[22] Lord points to the testimony by his father, Leslie Lord, about Lord being "a good boy," which led the trial court to allow cross-examination of Leslie Lord on whether he knew the details about his son's prior convictions. The court does not believe that this statement by Leslie Lord was the result of poor witness preparation, but an emotional declaration of his love for his son.

prosecutor impermissibly shifted the burden of proof from the state to Lord by telling the jury that it had to decide whether or not there were sufficient mitigating circumstances to merit leniency and that "[s]imply put, . . . . are there sufficient reasons for why this defendant deserves a break?" Although the prosecutor might be advised to stay away from this formulation of the question, the court finds that there was no unfairness resulting in a denial of due process. The jury was properly instructed on the burden of proof, and defense counsel reminded the jury of the question facing it.

Second, Lord alleges that the prosecutor argued all murderers should be put to death.[23] while the prosecutor might again be advised to refrain from such grandiose rhetoric, the jury was instructed and understood that the decision as to the appropriate penalty was in its hands and that the state had the burden of proving that the death penalty was appropriate in this case. The court cannot conclude that the prosecutor's rhetorical

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[23] The prosecutor stated in part as follows: "The ancients tell us unflinchingly that they executed murderers. They realized that it is not enough to proclaim the sacredness and the inviolability of human life. It must be secured as well by threatening those with the loss of their own lives. . . . . No society can profess that the lives of its members are secure if those who do not allow innocent others to continue living are themselves allowed to continue living at the expense of the community.'

flourishes introduced any fundamental unfairness into the penalty phase.

Lord argues that the prosecutor's comments about the fact that the jurors were not the first ones asked to make such a decision, that others had done it, and that their decision was collective, not individual, erroneously coerced juror unanimity. The prosecutor's comments were partly truisms which did not insist on any particular result and partly a recognition of the jurors' responsibility to deliberate as a group. The jury instructions themselves told the jurors that they were to deliberate with a view to reaching a unanimous decision, but only if they could do so without violating their individual consciences. The court finds no error.

Lord points to the prosecutor's argument that Lord's family's love is not a mitigating circumstance. As did the court in Jones v. Butler, 864 F.2d 348, 360 (5th Cir. 1988) in response to a similar argument, this court finds that the prosecutor was simply arguing its insufficiency in this case.

Finally, Lord challenges the prosecutor's reference to Lord being convicted of murder in the second degree. Although this reference was not technically accurate, the court

does not find any fundamental unfairness. Also, there is no merit in Lord's contention that the prosecutor's passing reference to burglary somehow intimated to the jury that he had committed one. The jury was perfectly aware of the crimes with which Lord was charged.[24]

6. Summary chart in penalty deliberations

Lord challenges the use of the summary chart during penalty phase jury deliberations. For the same reasons stated concerning the use of the chart in guilt phase jury deliberations, the court finds no reversible error.

7. Resubmission of evidence in penalty phase excited passion and prejudice

Lord contends that allowing the jury to consult the exhibits from the guilt phase in reaching a decision on the appropriate sentence was prejudicial in that it could serve no purpose but to excite passion and prejudice. As long as the exhibits were properly admitted at trial, the court finds no merit in this argument.

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[24] Given the court's determination that the cross-examination during the penalty phase raised only issues of state law which are not cognizable in this federal proceeding, the court will not address the merits of Lord's contention that the prosecutor erred in referring to that cross-examination during closing argument.

8. Proportionality review

For each case in which the death penalty is imposed, the Washington Supreme Court is required by statute to determine '[w]hether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." RCW 10.95.130 (2)(b). The statute sets forth the pool of cases, which is comprised of reported appellate cases since 1965 in which capital punishment was considered, whether or not it was imposed or executed, and cases in which reports have been filed with the Washington Supreme Court under the Washington aggravated murder statute. Id.

Lord contends that he was denied due process during the proportionality review done by the Washington Supreme Court in his case. As authority for this proposition, he relies on Harris by and through Ramseyer v. Blodgett, 853 F. Supp. 1239, 1286-1291 (W.D. Wash. 1994). Harris held that the petitioner's procedural due process rights were violated because Washington law does not provide any guidelines or procedures for carrying out the required proportionality review, and that

this error had a substantial and injurious effect on the result reached by the Washington Supreme Court in his case.

As set forth in Furman v. Georgia, 408 U.S. 238, 248, 310 (1972), the purpose of doing a proportionality review is to limit the jury's untrammeled discretion to impose the death penalty so as to prevent wanton and freakish imposition of the death penalty. The underlying concern was that the race of the victim or defendant would be a factor causing the jury to impose the death penalty in an aberrant manner. The purpose of appellate review was to prevent arbitrary and capricious jury decisions.

In State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), the Washington Supreme Court revisited the standards governing the statutory proportionality review in Washington. The court in Brett pointed out that the requirement for the jury to find aggravating factors and no mitigating circumstances in order to impose the death penalty already channels and limits jury discretion. Id. at 213. Appellate review only serves as an additional opportunity to check for the disproportionate or aberrant case. Id. at 212-13.

There is no unique or distinguishing characteristic of this defendant or of this crime which makes imposition of the death penalty wanton or freakish. The fact that juries may decline to impose the death penalty in some similar cases is not enough to establish disproportionality.

Lord criticizes the fact that, as illustrated by the various opinions in Brett, the members of the Washington Supreme Court have not reached agreement on how to describe or characterize the standards to be applied in carrying out the proportionality review. This court finds that while not the most desirable result, the differences of opinion set forth in Brett do not rise to the level of a constitutional denial of due process given the limited purpose of the review. Whether one looks to "similar case" as stated in the statute or describes the procedure as looking for "family resemblances," the pool of cases used for comparative purposes will be the pool that the legislature has defined in the statute. The result of the analysis in Harris would be to render the statute inoperative. If the legislature chose not to reenact the statute, there would be no proportionality review at all since none is required, and this additional safeguard would not exist.

Just as the Ninth Circuit concluded in Campbell v. Blodgett, 982 F.2d 1321, 1330-31 (9th Cir. 1992), that the Washington Supreme Court's review of Charles Campbell's death sentence for passion and prejudice did not violate his constitutional right to due process, this court finds that the Washington Supreme Court's proportionality review in Lord's case was sufficient to fulfill its essential function of ensuring the evenhanded, rational and consistent imposition of the death sentence under the law.

9. Error in admitting prior conviction for false imprisonment

In 1981, Lord entered a conditional plea of guilty to one felony count of false imprisonment in California. Evidence of this conviction was admitted during the penalty phase. Lord argues that this was error because the conviction was unconstitutionally obtained in that he was not advised of his constitutional rights or the elements of the crime and the court failed to determine whether there was a factual basis for the plea.

Because the court reporter's notes of the guilty plea proceeding have apparently not been preserved, it is impossible to review a transcript. However, the minutes reflect that Lord

was advised of his rights and waived them. There is no reason to believe that the presiding judge did not fully and completely state his rights. The minutes also reflect that the district attorney recited the facts underlying the charge to which Lord pled, and that Lord made no comment. Based on the available evidence, this court is satisfied that Lord's guilty plea was constitutionally obtained and that there was no error in admitting the conviction during the penalty phase based on the invalidity of the conviction.

10. Cross-examination of Lord after allocution

During the penalty phase, Lord sought and was granted an opportunity to address the jury personally in an unsworn allocution. Before he began speaking, he was warned by the trial court that he could allocute without being subject to cross-examination if his remarks were restricted to a plea for mercy. He was told that if he offered evidence or factual statements, however, he could be cross-examined. During his allocution, Lord protested his innocence of the murder of Tracy Parker and of any attempt to encourage others to lie for him, denied making any statements of guilt to Sonny Belgard and Rex Harvey, discussed his prior criminal history, and accused

police officers and prosecutors of lying during trial. Because the trial court deemed Lord's allocution to be testimony, the prosecutor was allowed to cross-examine him about whether he had asked witnesses to lie for him, whether he had committed the crime charged and the details underlying his prior criminal record.

Lord contends that he had a constitutional due process right to address his sentencers directly in an unsworn allocution without cross-examination, and that he was denied this right when the prosecutor was allowed to cross-examine him at the close of his allocution.

The state concedes that the Ninth Circuit recognizes allocution as a right guaranteed by the due process clause of the United States Constitution. Boardman v. Estelle, 957 F.2d 1523, 1530 (9th Cir. 1992). The state contends, however, that Boardman announced a new constitutional rule of criminal procedure which is not applicable to Lord's case pursuant to Teague v. Lane, 489 U.S. 288 (1989).

The state's argument has no merit. The nonretroactivity rule announced in Teague only takes effect when a conviction is final. The Boardman decision was issued on January 9,

1992; Lord's conviction did not become final until October 5, 1992 when the United States Supreme Court denied Lord's petition for writ of certiorari from denial of his direct appeal. 506 U.S. 856 (1992); Saffle v. Parks, 494 U.S. 484, 487, 489 (1990). Turning to the merits of Lord's argument, the state does not present any authority in support of the trial court's ruling that an allocution going beyond the bounds of a plea for mercy thereby becomes testimony which is subject to cross-examination, nor is there any indication in Boardman that the right of unsworn allocution without cross-examination is so restricted. On the contrary, the defendant in Boardman alleged harmful error resulting from the trial court's refusal to let him speak because he had intended to rebut information offered by the parents of his victims.

In Jeffries v. Blodgett, 5 F.3d 1180, 1191 (9th Cir. 1993), the Ninth Circuit specif ically noted that "Washington state law provides a right of allocution to the defendant to make a statement during the closing arguments which is not subject to dirert or cross-examination." (emphasis supplied) In Jeffries, a capital case, defendant exercised his right of allocution by telling the jury that he was innocent and refusing

to beg for mercy for crimes he did not commit. During closing argument, the prosecutor pointedly reminded the jury that defendant's statement was unsworn and not subject to cross-examination. The Ninth Circuit held that the prosecutor's argument was an appropriate rebuttal to defendant's contention that he was telling the truth and not an improper comment on defendant's failure to take the stand.

Similarly, other courts addressing the scope of a defendant's right to allocution have upheld the principle that a defendant has a right to allocute without being subject to cross-examination, while noting that the prosecutor may then call the jury's attention to the unsworn, unchallenged nature of defendant's statements. See, e.g., McNelton v. State of Nevada, 111 Nev. 900, 900 P.2d 934, 936 (1995 ); Colvin-El v. State of Maryland, 332 Md. 144, 173, 630 A.2d 725, 739 (1993), cert. denied,, U.S. 11 114 S.Ct. 2725 (1994); and Jones v. State of Mississippi, 381 So.2d 983, 993-94 (Miss.), cert. denied, 449 U.S. 1003 (1980).

In keeping with the above-cited authorities, the court concludes that allowing Lord to be cross-examined as to statements he made during his allocution was error. However,

Boardman cautions that infringing on a defendant's right of allocution is subject to harmless error analysis. 957 F.2d at 1530. In this case, the error cannot be deemed harmless. The information which the prosecutor brought out or emphasized about the topics discussed in Lord's allocution was devastating to his case, including cross-examination about the polygraph examination which Lord admitted he failed and about the factual basis for his prior criminal convictions in California.

11. Ineffective assistance of counsel during penalty phase

Lord contends that trial counsel rendered ineffective assistance of counsel during the penalty phase. The court will examine Lord's claims in light of the Strickland standard set forth above in connection with Lord's claim concerning trial counsel's performance during the guilt phase.

First, Lord argues that trial counsel failed to conduct proper research and investigation into the nature of his prior juvenile adjudication and the validity of his false imprisonment conviction. Since the court found no error in the admission of Lord's prior record during the penalty phase, his claim has no merit.

Second, Lord alleges that trial counsel failed to investigate and present available mitigation evidence and improperly delegated responsibility to an assistant. Contrary to Lord's allegation, trial counsel did conduct a wide-ranging investigation of Lord's background and interviewed numerous family members and friends. It is not necessary for counsel to exhaust every conceivable source of information in order to conduct an adequate investigation. As for delegating responsibility to an assistant, this decision fell within the normal range of trial preparation strategy for busy defense counsel in a complicated case.

Lord's trial counsel did present numerous witnesses on his behalf during the penalty phase. The court is not convinced that putting other family members and friends on the stand would have been anything but duplicative of evidence which was presented. To the extent that Lord's mother did not testify during the penalty phase, she herself made that decision after having been asked to appear. Lord himself told his trial counsel that he did not want his mother to testify or to put on other evidence about his family.

The court concludes that trial counsel provided effective assistance of counsel during the penalty phase.

12. Removal of defense counsel from case

During closing argument in the guilt phase of the trial, a conflict developed between Lord and defense counsel Ron Ness which resulted in Ness' absence from the courtroom during the prosecutor's rebuttal.[25] Three days later, Mandel indicated that Lord had asked that Ness not proceed as his counsel, but she also said that she thought Lord was not competent. When the court inquired directly of Lord about Mandel's statement, Lord indicated that he wanted Ness to withdraw from the case or to remain handcuffed in Ness' presence, that he did not want Mandel to withdraw, and that he believed himself competent to assist counsel in his defense.

The next day, the trial court inquired again in a closed hearing about Lord's wishes. He indicated that he wanted Mandel to proceed with representation, but that he did not want Ness to speak to him or to the jury. Because the judge asked a compound question, it is unclear whether Lord indicated a

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[25] Lord expressly agreed on the record to Ness' absence; co-defense counsel Judith Mandel was present in the courtroom throughout the proceedings.

desire for Ness' withdrawal from the case. However, a short time later in open court, the judge once again asked Lord whether he was moving to have Ness removed as his attorney. Lord responded that he was not. In response to another question from the judge, he answered that he did not wish to represent himself.

An examination of the record thus clarifies that Lord never made an unequivocal motion for Ness' withdrawal from the case. Given Lord's responses to the judge's direct inquiries of him, the judge did not commit error in refusing to allow Ness to withdraw. Nor is there any basis for Lord's contention that the trial judge failed to conduct a proper inquiry. The record reveals that the judge made every effort to ascertain Lord's intention with regard to Ness.

13. Competency hearing

During the same hearing discussed above, Mandel moved for a competency hearing on the grounds that Lord was exhibiting signs of incompetence including telling a guard that the devil asked him to drink a pint of his own blood in order to prove his innocence; that Lord had told the court he wanted Ness to withdraw or, alternatively, that he, Lord, be shackled in

the courtroom; and that Lord did not want mitigation evidence presented. The court initially granted the defense request for an examination of defendant, but decided not to proceed when defense counsel failed to locate an expert who could attend. Ultimately, the trial judge found that there was no need for a competency hearing because, based on her observations of Lord during ten weeks of trial, she saw no indication that he was incompetent to stand trial. However, she did state that "Mr. Lord, although competent to stand trial and to participate in the sentencing phase, is not competent to make trial strategy decisions and/or determine what should or should not be presented to the jury."

Lord challenges this ruling on the grounds that the trial court erred by applying two different standards to the issues of competency to stand trial and waiver of counsel. Lord is correct that the same standard is applicable to both issues. Godinez v. Moran, 509 U.S. 389, 397-98 (1993). However, Lord is not correct in contending that these were the issues facing the court. Instead, the court was dealing with a situation in which Lord expressly disavowed a desire to waive counsel and represent himself, but at the same time refused to allow his

counsel to present a case for mitigation on his behalf. Defense counsel were thus bound to represent Lord, but barred from exercising their best legal judgment about what his defense required.[26]

Under these circumstances, this court concludes that the trial judge's decision was eminently reasonable. Although she found no justification for finding Lord incompetent to stand trial based on ample opportunity to observe Lord's behavior in the courtroom and his interaction with defense counsel, she also declined to allow him to dictate trial strategy which his own counsel deemed ruinous to his cause and which amounted to a refusal to contest the prosecutor's penalty phase evidence.

14. Ineffective assistance of counsel on direct appeal

The court finds no basis for Lord's contention that he was denied effective assistance of counsel on direct appeal as a result of claims not raised on direct appeal or on the basis of unrecorded portions of the trial.

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[26] Even assuming that Lord expressed a desire to fire Ness as his defense counsel, he never asked to have Mandel removed from the case. This distinguishes Lord's situation from that in United States v. Arlt, 41 F.3d 516 (9th Cir. 1994), where defendant did seek to represent himself.

15. Hanging as cruel and unusual punishment

Lord argues that execution by hanging would violate the Eighth Amendment prohibition against cruel and unusual punishment. Lord acknowledges Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) cert. denied, 471 U.S. 1094 (1995), in which the Ninth Circuit ruled that judicial hanging as conducted in Washington does not wantonly and unnecessarily inflict pain, and accordingly does not violate the Eighth Amendment. Lord contends, however, that the protocol used to conduct hanging is too unreliable to pass muster under the Eighth Amendment.

In support of this contention, Lord invokes the testimony of Dr. Donald T. Reay, medical examiner for King County, in Rupe v. Wood, C91-1635Z (W.D. Wash.) concerning the state execution by hanging of Charles Campbell. Although Lord concedes that Dr. Reay found no evidence that Campbell was near decapitation, Lord nevertheless insists that Dr. Reay's testimony about the severe injuries suffered by Campbell supports the conclusion that the hanging procedure is too unreliable to survive Eighth Amendment scrutiny.

The court finds no support in the record for Lord's argument. Moreover, even if judicial hanging contains risks of accident, the Ninth Circuit has already concluded in Campbell, that "[t]he risk of accident cannot and need not be eliminated in order to survive constitutional review." 18 F.3d at 687.

16. Cumulative error

Lord argues that even if individual errors in the guilt and penalty phase are not sufficient in themselves to require reversal of the jury verdicts, their cumulative effect requires reversal. The court finds no merit in this contention.

17. Errors in guilt phase infected penalty phase

Since the court has not found any error in the guilt phase sufficient to warrant reversal of Lord's conviction, this argument is without merit.

## III. CONCLUSION

Lord's petition for writ of habeas corpus is DENIED insofar as it seeks a new trial as to guilt or innocence. Lord's petition is GRANTED as to the sentence of death, and the sentence is VACATED. A new sentencing proceeding may be held or the state may elect to waive the death penalty. In that

case, petitioner will be sentenced to life in prison without possibility of release.

DATED at Seattle, Washington this 19th day of August, 1997.

/s/
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

[FILED]

[December 5, 1991]

[No. 54385-2. En Banc. ]

THE STATE OF WASHINGTON, Respondent, v. BRIAN KEITH LORD, Appellant.

[1] Homicide – Aggravated First Degree Murder – Guilt Phase – Standard of Review. Errors alleged in the guilt phase of a capital case are reviewed under the same standard as errors in noncapital cases.

[2] Homicide – Aggravated First Degree Murder – Procedural Rules – Construction. Procedural rules are more liberally construed in favor of defendants in capital cases.

[3] Evidence – Opinion Evidence – Expert Testimony – Scientific Acceptance – Necessity. Scientific evidence is admissible if it is based on scientific principles and methods that have gained general acceptance in the scientific community.

[4] Evidence – Opinion Evidence – Expert Testimony – Scientific Acceptance – Particular Tests. The following scientific tests have gained sufficient acceptance in the scientific community so that the results of such tests are admissible: electrophoresis for blood typing; acid phosphate test to determine the occurrence of sexual activity; and infrared spectroscopy, x-ray florescent spectroscopy, epi-illumination microscopy, and the use of spectrophotometers to microanalysis particles and objects.

[5] Appeal – Assignments of Error – Authority – Necessity. An appellate court need not decide a contention that is not supported by citation to authority.

[6] Evidence – Opinion Evidence – Expert Testimony – Uncertainty – Effect. When an expert testifies about the results of a test that has gained general acceptance in the scientific community, the lack of certainty regarding the

specific test goes to the weight of the testimony, not to its admissibility.

[7] Evidence – Demonstrative Evidence – Discretion of Court. The admission of demonstrative or illustrative evidence is favored and is reviewed under the abuse of discretion standard.

[8] Evidence – Demonstrative Evidence – Summary Chart – Accuracy – Necessity. A trial court must ensure that a chart summarizing the evidence is based on, and is a substantially accurate representation of, competent evidence already admitted.

[9] Evidence – Demonstrative Evidence – Summary Chart – Use During Deliberations – Validity. When a chart summarizing the evidence is used for illustrative purposes only and does not itself constitute evidence, it is error to allow the jury access to it during deliberations.

[10] **Evidence – Demonstrative Evidence – Summary Chart – Use During Deliberations – Harmless Error – Factors.**

**Error in allowing a jury to have access during deliberations to a summary chart that does not constitute evidence itself is harmless if the reviewing court determines from its analysis of the entire record that the defendant was not prejudiced thereby. In deciding whether the defendant was prejudiced, a reviewing court will determine whether the chart unduly emphasized one party's theory of the case and will view the error in the context of the entire trial and in light of all the related circumstances, including whether the defense had an opportunity to cross-examine the witnesses relative to the chart, to correct any claimed errors, and to present its own chart; whether the jury was instructed that the chart had no evidentiary value of its own; and whether the testimony made it clear that the conclusions drawn from the chart were subject to qualification.**

[11] Trial – Instructions – Adherence by Jury – Presumption – In General. A jury is presumed to heed the trial court's instructions.

[12] Trial – Comment on Evidence – What Constitutes – Test. A trial court's statements do not constitute a prohibited comment on the evidence under Const. art. 4, § 16 unless the nature and manner of the statements give rise to a reasonable inference of the court's attitude toward the merits of the case.

[13] Trial – Comment on Evidence – What Constitutes – Admission of Evidence. A trial court's decision to admit evidence does not, by itself, constitute a comment on the evidence in violation of Const. art. 4, § 16.

[14] Criminal Law – Constitutional Provisions – Due Process – Fundamental Fairness. The due process clause of the Fourteenth Amendment requires the State's acts to comport with prevailing notions of fundamental fairness

so that the defendant is not denied a meaningful opportunity to present a complete defense.

[15] Criminal Law – Evidence – Preservation – Failure of State – Potentially Useful Evidence. Absent bad faith, the State's failure to preserve evidence that is potentially useful to the defendant does not violate the defendant's federal due process rights.

[16] Witnesses – Cross Examination – Scope – Discretion of Court. Under ER 611(b), the scope of cross examination is a matter within the trial court's sound discretion.

[17] Courts – Judicial Discretion – Abuse – What Constitutes. A trial court has abused its discretion only if no reasonable person would have taken its position.

[18] Criminal Law – Evidence – Photographs – Gruesome Nature – Discretion of Court. A trial court's determination that the probative value of gruesome photographs in a criminal case outweighs their

prejudicial effect is reviewed under the abuse of discretion standard. When there is expert testimony that the photographs would aid the jury in understanding the expert testimony and more accurately represent the injuries than the expert testimony, admission of the photographs does not constitute an abuse of discretion.

[19] Evidence – Character Evidence – Reputation – Elements. Evidence as to a witness's reputation is admissible under ER 608(a) if (1) the testifying party knows the reputation, (2) the reputation is for truth and veracity, not general or overall reputation; (3) the evidence is limited to the witness's reputation in the community; (4) the evidence is not remote in time from the date of the trial; and (5) the evidence is not based on an individual opinion.

[20] Evidence – Character Evidence – Reputation – General Community. For purposes of admitting evidence of a person's reputation for truthfulness under ER 608(a), the reputation must exist in the general community in which

the person resides, not in a particular community such as within the person's family or among persons whose knowledge of the person is acquired solely from interactions within the criminal justice system.

[21] Homicide – Aggravated First Degree Murder – Aggravated Circumstances – Alternative Means – Unanimity – Necessity. In a prosecution for aggravated first degree murder in which alternative underlying crimes are charged as aggravating circumstances under RCW 10.95.020, the jury must unanimously agree as to which of the underlying crimes the defendant did in fact commit.

[22] Trial – Instructions – Sufficiency – Considered as a Whole. An omission in one instruction can be cured by language in a related instruction.

[23] Appeal – Review – Issues Not Raised in Trial Court – Instructions – Complex Nature. The complexity of instructions does not alone constitute a manifest error

affecting a constitutional right under RAP 2.5(a)(3) warranting review for the first time on appeal.

[24] Criminal Law – Trial – Taking Case From Jury – Sufficiency of Evidence – In General. Evidence is sufficient to uphold a criminal conviction if, after viewing the evidence most favorably toward the prosecution, any rational trier of fact could have found that the elements of the crime were proved beyond a reasonable doubt.

[25] Criminal Law – Right to Counsel – Effective Assistance of Counsel – Test – In General. A criminal defense attorney's representation does not violate the defendant's constitutional right to counsel unless (1) the attorney's performance was deficient, i.e., the attorney made errors so serious that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) the deficient performance prejudiced the defense, i.e., the errors were so serious that the defendant was deprived of a fair trial.

[26] Criminal Law – Right to Counsel – Effective Assistance of Counsel – Trial Strategy – In General. A claim of ineffective assistance of counsel cannot be based on a criminal defense attorney's decisions effectuating legitimate trial strategy or tactics.

[27] Criminal Law – Right to Counsel – Effective Assistance of Counsel – Prejudice. A defendant has not been prejudiced by defense counsel's deficient performance unless the defendant can demonstrate a reasonable probability that the result of the proceeding would have been different had the attorney's errors not occurred.

[28] Criminal Law – Trial – Misconduct of Prosecutor – Violation of Rules of Professional Conduct. A prosecutor's violation of the Rules of Professional Conduct is not grounds for reversing a criminal conviction.

[29] Criminal Law – New Trial – Misconduct of Prosecutor – Discretion of Court. Whether prosecutorial misconduct warrants a new trial is a decision within the trial court's sound discretion.

[30] Criminal Law – New Trial – Misconduct of Prosecutor – Test. Prosecutorial misconduct warrants a new trial only if it prejudiced the defendant's right to a fair trial and there is a substantial likelihood that it affected the verdict.

[31] Criminal Law – Punishment – Death Penalty – Review – Heightened Scrutiny – What Constitutes. Special sentencing proceedings resulting in a sentence of death are subject to heightened scrutiny on appeal. "Heightened scrutiny" means a closer, more careful review of the record; it does not mean a stricter standard of review.

[32] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Mitigating Circumstances –

**Rebuttal – Uncharged Crimes. When mitigating evidence is produced by the defendant in the penalty phase of a capital case, the State may introduce any relevant evidence to rebut the defendant's mitigating evidence, including evidence of an uncharged crime.**

[33] **Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Mitigating Circumstances – Rebuttal – Balancing Test. Before admitting the State's rebuttal evidence in the penalty phase of a capital case, the court must balance the rebuttal value of the evidence; i.e., balance the extent to which it tends to rebut the defendant's mitigating information against its prejudicial effect.**

[34] **Criminal Law – Review – Issues Not Raised in Trial Court – Constitutional Rights – Prejudice – Necessity. Absent a showing of prejudice, an appellate court in a criminal case need not review a claim of constitutional error that was not raised to the trial court.**

[35] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Evidence – Prior Convictions – Juvenile Convictions. Under RCW 10.95.070(1), the State may introduce evidence of a defendant's prior convictions, including juvenile convictions, during the penalty phase of a capital case. The fact that juveniles do not have a constitutional right to a jury trial does not render juvenile convictions inadmissible in such proceedings.

[36] Criminal Law – Punishment – Sentence – Right of Allocution – What Constitutes. Allocution is a defendant's personal plea for mercy. If the defendant offers a version of the facts or disputes evidence, the defendant is offering testimony, not making a plea for mercy.

[37] Criminal Law – Punishment – Sentence – Right of Allocution – Cross Examination. A defendant in the penalty phase of a capital case is subject to cross examination concerning testimony improperly offered

during allocution if the trial court expressly warned the defendant that statements exceeding the scope of proper allocution would be subject to cross examination.

[38] Criminal Law – Insanity – Competency to Stand Trial – Disagreement With Counsel – Effect. A criminal defendant's disagreement with defense counsel as to the manner in which to proceed does not, by itself, raise the issue of the defendant's incompetency.

[39] Criminal Law – Insanity – Competency to Stand Trial – Hearing – Necessity. The party seeking a competency hearing for a criminal defendant has the initial burden of producing facts establishing that there is a reason to doubt the defendant's competency under RCW 10.77.060(1). Whether that burden is satisfied is a determination within the trial court's discretion.

[40] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Prosecutor's Conduct – Misconduct – Burden of Proof. A defendant

challenging an argument made by a prosecutor during the penalty phase of a capital case has the burden of establishing that the argument was improper and prejudicial.

[41] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Mitigating Circumstances – Taking Cases From Jury -- Sufficiency of Evidence. There is sufficient evidence to uphold a death sentence under RCW 10.95.130(2) if any rational trier of fact, independently reviewing the evidence in the record most favorably toward the State, could have found beyond a reasonable doubt that leniency was not merited.

[42] Criminal Law – Punishment – Death Penalty – Review – Proportionality – Test. A death sentence is not excessive or disproportionate under RCW 10.95.130(2)(b) if in similar cases throughout the state the death penalty has been imposed generally and its

imposition under the circumstances is not wanton and freakish.

[43] Criminal Law – Punishment – Death Penalty – Review – Proportionality – Purpose. The purpose of the proportionality requirement for death sentences under RCW 10.95.130(2)(b) is to protect against imposition of the death sentence based on race or random arbitrariness. Proportionality review cannot ensure that the death penalty is always imposed in superficially similar circumstances. Merely adding up aggravating and mitigating factors is not a substitute for informed analysis.

[44] Criminal Law – Punishment – Death Penalty – Review – Proportionality – Similar Cases – Determination. An appellate court undertakes a proportionality review of a death sentence under RCW 10.95.130(2)(b) by analyzing "family resemblances" among cases. Cases are comparable if there exists a network of overlapping similarities between them.

[45] Criminal Law – Punishment – Death Penalty – Special Sentencing Procedure – Evidence – Sentence for Other Defendants. In the penalty phase of a capital case, evidence of the sentences typically received by defendants convicted of similar crimes is not relevant.

DORE, C.J., and UTTER and SMITH, J.J., dissent by separate opinions; JOHNSON, J., did not participate in the disposition of this case.

Nature of Action: Prosecution for aggravated first degree murder.

Superior Court: The Superior Court for Kitsap County, No. 86-1-00470-8, Karen B. Conoley, J., on August 18, 1987, entered a judgment on a verdict of guilty and a special sentence verdict of death.

Supreme Court: Holding that certain tests performed on the evidence were generally accepted in the scientific

community; that experts' lack of certainty affected the weight of their testimony, not its admissibility; that the admission of two trace evidence summary charts for illustrative purposes did not constitute an abuse of discretion or an unconstitutional comment on the evidence; that the error in sending the charts to the jury room was not prejudicial; that due process was not violated by the State's failure to subject the alleged murder weapon to a particular test or by an investigator's submission of a false report; that the trial court had not improperly limited the scope of cross examination of the investigator; that the admission of photographs of the victim was proper; that the exclusion of impeachment evidence concerning jail trusties to whom the defendant had made incriminating statements was proper; that the instructions as a whole did not relieve the State of its burden of proof; that the evidence was sufficient to convict; that the defendant was not denied effective assistance of counsel; that any prosecutorial misconduct did not violate the defendant's right to a fair trial; the rebuttal evidence offered during the penalty phase was proper; that the defendant was subject to cross examination concerning evidence he offered during allocution; that a competency hearing was not required

before the beginning of the penalty phase; that the prosecutor's closing argument in the penalty phase did not constitute misconduct; that there was sufficient evidence of an absence of mitigating circumstances meriting leniency; that the death sentence was not excessive, disproportionate, or the result of passion or prejudice; and that challenges to the death penalty statute lacked merit, the court affirms the conviction and sentence.

Brian Keith Lord, pro se, Bertha B. Fitzer, and Michael J. Trickey, for appellant.

C. Danny Clem, Prosecuting Attorney, and Irene K. Asai and Pamela B. Loginsky, Deputies, for respondent.

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[FILED]

[December 5, 1991]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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|---|---|---|
| THE STATE OF WASHINGTON, Respondent, | ) | No. 54385-2 |
| v. | ) | En Banc |
| BRIAN KEITH LORD, Appellant. | ) | Filed _____ |

DURHAM, J.—On September 30, 1986, the half-clothed body of 16-year-old Tracy Parker was found by a horseback rider. She had been raped, murdered, and dumped in the brush by the side of a road. Tracy had been missing for more than 2 weeks before she was discovered.

Brian Keith Lord was convicted by a jury in the Kitsap County Superior Court of aggravated first degree murder. The jury found that there were not sufficient mitigating circumstances to warrant leniency, and Lord was sentenced to death. He appealed directly to this court pursuant to the mandatory review provision of Washington's death penalty

statute, RCW 10.95.100. Finding no reversible error, we affirm.

We begin with a brief statement of the State's theory of the case in order to provide a context in which to assess the complicated facts of this case. The State relied on well over 100 pieces of trace evidence to support its theory. According to the State, Tracy Parker (Tracy) encountered Brian Keith Lord (Lord)[1] at the house of a mutual acquaintance at approximately 8 p.m. on Tuesday, September 16, 1986. Tracy and Lord had known each other for approximately 3 years. She was late getting home and asked Lord for a ride. He tricked her into going to his brother's house after ensuring that no one was there. Once in his brother's workshop, Lord struck her from behind with a hammer, knocking her unconscious, and raped her. He then struck her repeatedly with the hammer, fracturing her skull, and inflicting an additional wound to her vagina. Lord then wrapped her dead body in a U-Haul blanket, put it in the back of his brother's blue pickup truck, and

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[1] To avoid confusion, defendant Brian Keith Lord shall be referred to throughout this opinion as "Lord". After appropriate introduction, other members of his family will be referred to by their first names only.

disposed of the body, the blanket, and the clothing at separate locations.

Lord immediately returned to his brother's house, where he hosed out the workshop and the back of the truck. The next morning he returned and continued to clean the shop and the truck. Later, Lord attempted to cover evidence of blood in the workshop by rubbing grease into the spot on the floor where Tracy's body had been. Lord also offered bribes to friends and acquaintances to cover his actions. Lord denied that he had committed the crime.

## FACTS

We now turn to the evidence which was presented to the jury. On September 16, 1986, 16-year-old Tracy Parker arrived home from school at approximately 3 p.m. She told her mother that she was going riding. Tracy had permission to ride horses belonging to Wayne and Sharon Frye whenever she wanted. The Fryes lived less than a mile away from Tracy and hidden keys provided access to the Fryes' house and equipment area. Tracy's mother told her to be home before dark, by 7 or 7:30 p.m., and then left for work.

No one was at the Frye residence when Sharon Frye left the house shortly before 6 p.m. or when she returned at approximately 8:20 or 8:30 p.m. She did notice the next day that the riding gear was in place.

At 7:15 p.m., Tracy rode to the house of a neighbor and stopped to talk for about 10 or 15 minutes. From 7:30 to 7:45 p.m., Tracy stopped to visit a friend who was babysitting at a nearby residence. As Tracy left, she said she had to "hurry and get home before her mom got home." She told her friend that she was going to "[t]ake the horse back to the Fryes' house and go straight home." At 8 p.m., Tracy called a friend, apparently from the Frye residence. Tracy was not home when her mother returned from work shortly after 9 p.m.

The defendant, Brian Keith Lord, had known the Fryes for 3 years. Lord is a carpenter and, during September 1986, he helped the Fryes remodel their house. He also had access to their house, and he knew where the keys were kept. Lord met Tracy through the Fryes and had spoken with her a number of times when she came to ride. Sometimes he gave Tracy a ride home, occasionally in a blue pickup truck owned by his brother, Kirk Lord.

Between 6:30 and 7 p.m. on September 16, Lord met with a contractor, Chris Rongve, in the Silverdale area to discuss construction work. At that point, Lord was driving a Camaro that belonged to his girl friend, Debby Parker (no relation to Tracy Parker). Rongve observed that Lord was wearing an orange plaid shirt and either gray sweatpants or blue Levi's. Rongve also saw Lord take a drink from a large beer bottle. Lord left the meeting before 7:30 p.m. Although Lord was to meet with Rongve again the next day, Lord never appeared.

At 7:44 p.m., Lord made an 8-minute, long-distance call from the Fryes' house to his apartment to tell his girl friend that he would be late for dinner. He also called his brother's house. The State theorized that Lord made these calls to ensure that no one would be looking for him and that no one was at his brother's house.

That same evening, Don and Radwyn Carroll were also at Kirk Lord's house. They are the parents of Kirk's wife, Robin. Don had been hauling firewood to Kirk's house all day and was joined by his wife on the third trip. Kirk and Robin were out of town, and the Carrolls had been watching the house. The Carrolls arrived at Kirk's at approximately 4:30 p.m. Radwyn

saw Lord driving out of Kirk's driveway just as they were approaching it. They did not stop and talk with him. During their visit, Radwyn looked in Kirk's workshop and noted that it looked clean. At that time, Kirk's blue pickup was parked in front of the garage.

After Don unloaded the firewood, the Carrolls left for dinner. They did not return to Kirk's house until approximately 8:30 p.m. When they returned, Debby Parker's Camaro was parked in front of the workshop and the blue pickup was gone. Don noticed a smoldering "burn pile" in the yard by the side of the house.

About 15 to 20 minutes after the Carrolls arrived, Lord drove up to the workshop in the blue pickup. He was driving "[p]retty fast" and the truck was "smoking and steaming." Lord was aware that the truck had a faulty head gasket and that he should not be driving the truck because it could ruin the engine. Even though it was only about 58 degrees, Lord was not wearing a shirt.[2]

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[2] On September 16, 1986, the temperature recorded approximately 10 miles from the murder scene by the United States Navy was 59 degrees at 8 p.m., 57 degrees at 9 p.m., and 56 degrees at 10 p.m.

Don went into the house and watched Lord from the window. Lord, still without a shirt, began washing the blue pickup. Using a hose, he washed out the back of the pick-up, even though it was full of debris. He took a blanket from the back of the truck and threw it on the ground in an area where water was running from the hose. Don remembered that the blanket was beige or orange.

When Don went out to talk to Lord, Lord told Don he was building a stereo cabinet for Kirk and Robin. But when Don asked to see it and walked toward the workshop, Lord said, "No, I don't want you to see it yet, I want Kirk to be the first one to see it." Don agreed and did not enter the workshop that evening.

At approximately 9 p.m., Kirk and Robin arrived home. Don and Radwyn visited with Robin and Kirk inside the house. Lord did not enter the house, but he visited with Kirk in front of the workshop for several minutes. Kirk remembered Lord wearing gray pants and a shirt. Lord did not show Kirk any cabinet or table, and Kirk also did not enter the workshop that evening. When the Carrolls left at approximately 10:30 p.m., Lord was gone.

A dinner party had been planned for that night at Lord's house, and the guests had been waiting for him when he called at 7:44 p.m. Lord was to have brought a dining table that he was making for them to use that evening. When Lord had not appeared by 10 p.m., they ate without him.

Lord finally arrived home at approximately 10:15 p.m., wearing gray sweatpants and a plaid shirt. He stood in the doorway for a couple minutes, and then walked into the bathroom. Although the guests waited in the living room, some of them left at 10:30 p.m. when Lord had not come out. When Lord finally appeared, he was acting unusual. Two guests noticed that Lord had a fresh wound on his arm. Lord told them he was late because he had been working, but he did not say where. He did not bring a table home.

The next morning, September 17, Tracy had not returned and her mother began making telephone inquiries. She also went to the Fryes' because it was the last place she knew Tracy had been. After speaking to Sharon Frye, Tracy's mother went home and called the sheriff's office to report Tracy missing. In addition to notifying the sheriff, a private investigator was called

in, bloodhounds were used, and the family searched the area themselves. Tracy was not seen alive after September 16.

At 8 o'clock that morning, Lord arrived back at Kirk's house. Lord began cleaning the debris out of the blue pickup and putting it into his truck. There was about a foot of debris in the blue pickup. Lord then hosed out the remainder of the debris.

When Kirk looked into the workshop that morning, he noticed water puddles on the floor as if it had been washed out recently. A photo showed possible water stains on the bottom of all of the doors that had been stored in the workshop. Kirk said that the doors had not been water stained before he went to California.

Testimony was given by Robert Machinski, who had met Lord while doing construction work. According to Machinski, Lord had called him on September 15 to ask him to help burn scrap wood at Kirk's. Approximately 30 sections of old, green cedar fence panels were stacked in front of the garage door and Lord wanted to burn them. Lord told Machinski he had brought the scrap wood in the blue pickup, which was then parked at Kirk's. After they burned the lumber, they swept the remaining

scraps and sawdust and paint chips into a pile and then onto an orange U-Haul blanket. As they flipped the debris into the fire, Lord dropped his end of the blanket into the fire. Machinski saw sparks on the blanket. They shook out the blanket, folded it and set it on a pile of wood near the garage. Lord was wearing gray sweatpants, which Machinski did not see Lord wear again after that night. The gray sweatpants were never located.

A few days later, Machinski was again at Kirk's with Lord to work on the blue pickup. Lord drove the pickup halfway into the workshop. Machinski observed Lord scrape some grease and sludge off the engine and throw it on the workshop floor. Lord then took a rag or piece of cardboard and smeared the grease and sludge into the middle of the floor. Grease would damage any wood products it touched.

During the weekend of September 20, Lord and his girl friend told her father that the searching should occur "in the Island Lake area because that would be a good area to look for if somebody was--something had happened to them."

At the same time, two members of an organized search team found shoes, jeans, a jacket and panties by a dirt road near Island Lake. These clothes were identified as Tracy's. In

addition, they also found a red sweatshirt that was never identified. A "D.D. Bean & Sons Company" matchbook was found under the clothes. A torn red print towel was also found with the clothes. Once the clothing had been found, the sheriff's office took over the investigation.

On Monday, September 22, a search of a housing construction area near Island Lake turned up an orange blanket with the words "U-Haul Moving and Storage" printed on it. The blanket was found lying on top of brush. The vegetation under the blanket had no yellowing, indicating that the blanket had been there only a short time. The blanket was not moldy or smelly. Kirk reported owning an orange U-Haul blanket that was missing. When Machinski learned that the blanket had been turned up, he went to the police and told them that he and Lord had used such a blanket when burning scrap wood. Lord had worked at a jobsite near where the blanket was found.

Both Tracy's clothes and the orange blanket contained trace evidence which tied Lord to the crime. Hair, washed sand, white and green paint chips, charcoal, plaster, wood chips and sawdust were all found. In all, 30 categories of trace evidence were introduced, representing even more individual pieces of

evidence. These fragments of wood chips, paint and fibers were linked to 25 separate items or locations, including Tracy's body, her clothing, Kirk's workshop, and the blue pickup. Type "O" human blood was found on the jacket, blue jeans, red sweatshirt, towel, and also on the U-Haul blanket. Tracy's blood type was "O". Lord's blood type is "A". While there was also human blood on the panties, there was not enough to type. In addition, Tracy's blood contained an enzyme known as ADA 2-1, found in only 9 percent of the white population. This enzyme was found in the bloodstain on the U-Haul blanket.

Evidence pertaining to hair was also introduced to link Lord to the crime. A coarse body hair, which could have come from Lord but could not have come from Tracy, was found on the U-Haul blanket. A head hair that had the same characteristics as Tracy's was also found on the blanket. A hair was found on the red sweatshirt which was not similar to either Lord's or Tracy's head hair, but resembled hair found in the hair brush in Debbie Parker's car. There were also coarse body hairs on the red towel which were similar to both Lord's and Tracy's.

On September 24, the origin of the red towel was discovered during an interview with Wayne Frye at the sheriff's

office. Frye had used a towel as a curtain on his garage door. At some point, he had taken it down and put it with other rags. When he was taken to the evidence room and shown the red towel found with Tracy's clothes, he identified it as his.

On September 29, 1986, Donald Phillips, a forensic scientist employed by the Washington State Crime Laboratory, came to Kitsap County at the sheriff's request to aid in the investigation. Phillips and two detectives investigated Kirk's workshop after one of the detectives happened to notice wood chips and sand at the workshop that were similar to the trace evidence found on Tracy's clothing. Samples of this trace evidence were taken and sent to the crime laboratory for comparison. Phillips then used leuco-malachite green[3] to examine the blue pickup, the workshop, and the surrounding area for the presence of blood. Some items were sprayed and others were tested by applying the leuco-malachite green with a swab.

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[3] Leuco-malachite green is a low sensitivity reagent that yields a characteristic green color in a matter of 15 to 20 seconds when it comes in contact with blood. It is a presumptive, rather than specific, test because leuco-malachite green will also react in the presence of other substances including some vegetable juices, some metals, and rust.

Phillips and the detectives noted a positive reaction, consistent with the presence of blood, on the workshop floor. The pattern shown on the floor appeared to be in concentric circles. He sprayed a 6-foot square area near the door and noticed a reaction in circular pattern approximately 18 inches in diameter at its widest point. Phillips opined that the concentric pattern resulted from someone wiping something up. He also sprayed the large oil stain, which had been created by Lord, that was on the floor. Phillips observed a positive reaction consistent with the presence of blood around the perimeter of the stain.

Phillips tested a number of tools without reaction. He then sprayed some coiled extension cords which were lying next to the stain on the floor. In so doing, he sprayed a claw hammer that was lying underneath the cords. When he saw the hammer and noticed a positive reaction, he realized that he might have inadvertently sprayed the murder weapon, thereby impairing the crime laboratory's ability to do further, more specific, testing. He immediately took the hammer out to the two detectives, who both saw the positive reaction.

There was also a reaction consistent with blood on a door stacked in the workshop. On the inside of the garage door,

about 6 to 18 inches above the floor, there were drops of blood shaped as if they had hit the door at high velocity. Phillips chipped some drops off the door to be tested at the crime lab. These drops proved to be Tracy's blood type, type "O" human blood.

In November 1986, a controversy arose over Phillips' handling of the evidence at the workshop. The Washington State Crime Laboratory initiated an investigation, which was not completed because Phillips resigned in December 1986. During trial, an extended evidentiary hearing was held to determine the extent of any possible misconduct by Phillips or the State.

In addition to the physical evidence connecting Lord to the crime, Lord made inconsistent statements about his whereabouts and activities. On Wednesday, September 24, detectives working on the case first contacted Lord at his apartment. At that time, Lord told them he had last seen Tracy about 2 weeks prior, either on a Wednesday or a Thursday when she was at the Fryes' riding. He told them that on September 16 he had been at his brother's house polishing his brother's truck. He claimed that he had been there alone early in the afternoon making a coffee table and that "no one had either arrived or

departed while he was there." He had also made a "dump run" using his brother's truck. Lord reported that between 6 and 7 p.m. he had gone to the Fryes' house. Lord used a hidden key to enter the house to call his brother. He stayed about 5 minutes, then returned to his brother's and "partied" for about an hour. Lord said he was expecting his brother to return home from California, where he had been for several months. Lord said he returned to his apartment between 9 and 10 p.m.

Three days later, on September 27, Lord was at the Fryes' at the same time as two detectives. In another conversation, Lord commented that he hoped that Tracy was only a missing person. Later that evening, however, Lord told a witness that he was probably the last one to see Tracy alive, even though no one knew yet that she had been killed.

On September 30, detectives again questioned Lord. Even though he related essentially the same account of his activities on September 16, there were inconsistencies. Lord said he had arrived at Kirk's house between 8 and 9 p.m. Although he had previously said that he had seen no one while there, he now claimed that Don and Radwyn Carroll were there the entire time. Contradicting the Carrolls' recollection, Lord

claimed that he had last driven Kirk's blue pickup on September 14, and that that was also the last time he had seen Tracy.

Lord next spoke with another detective. He appeared nervous and was shaking during his conversation. Lord told that detective that he drank beer and last smoked marijuana approximately 3 weeks earlier. He added that when he smoked marijuana and drank beer, "he becomes a different person and he loses control."

While Lord was being questioned on September 30, Tracy's body was found. A horseback rider discovered the semi-nude body lying a short distance from the edge of Clear Creek Road, about 3 miles from Kirk's house.[4] That evening, Lord was arrested.

Detective Morgan immediately examined the scene where Tracy's body was found. When he lifted a section of Tracy's hair, he observed a circular indentation about the size of a quarter, approximately three-fourths of an inch, and one-eighth to one-fourth inch deep. The depth was even within the entire indentation. Detective Reichert, a trained specialist with

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[4] The 3-mile distance from Kirk's house to the body can be driven at the speed limit in 5 minutes 53 seconds. The 3-mile distance from the Fryes' to Kirk's takes about 6 minutes 30 seconds.

the Criminal Investigations Division on Special Task Force, was also present. At trial, he opined that whoever disposed of the body did not try to hide it. He also said that the body had been carried, not dragged. He, therefore, expected blood to be transferred from the body to the person carrying it. This was consistent with the State's theory at trial that Lord hurriedly disposed of the body, then cleaned up at Kirk's. It also explained Lord's attempts to stay out of the light--he did not wish to have the blood on him detected.

On October 2, an autopsy was done on Tracy's body. The medical examiner testified that Tracy had died 10 to 20 days prior to the date of the autopsy. He found evidence of six separate soft tissue wounds at various locations on Tracy's head. All of these injuries were from a blunt instrument that caused lacerations. One wound, on the back of her head, was roughly circular, approximately 1 to 1 1/4 inches in diameter. There were also wounds to the side and front of her head that had fractures beneath them. The impact required to cause such fractures was the same as the impact of a fall from several stories and was of a degree of force that could cause her death. There were also injuries to Tracy's front teeth. In all, there had

been a minimum of seven impact blows, possibly more, to Tracy's head. The wounds could have all been inflicted within approximately the same time frame, but it was impossible to say which one came before another. They were all probably inflicted within a matter of minutes or hours. The blows which produced the fracture to the right front of the skull probably caused death, not instantaneously, but within a matter of minutes, and would render the victim unconscious. There were no defensive wounds on her body. A wound was discovered in the genital area, approximately 1 inch in length and three-fourths inch deep, which the medical examiner opined was caused by blunt force. He also found sperm in her vagina. All of Tracy's injuries could have been caused by a hammer.

The blue pickup was impounded on October 1. When floor sweepings from the passenger side of the cab of the pickup were examined, a matchbook from D.D. Bean & Sons Company was found, which was identical to the one found with Tracy's body.

Testimony was also given that, on several occasions, Lord attempted from jail to influence people to change their statements. On October 11, Lord told his friend Machinski that

he would have given him a motorcycle had Machinski come to visit him before telling the detectives about the U-Haul blanket. At a second visit, Lord told Machinski that if he remembered the blanket being pink, instead of orange, he could have $1,000 and Lord's truck.

Lord was also visited in jail by Thomas DeMars, who had known Lord for 3 or 4 years. DeMars testified that during a visit on October 19, Lord asked him to tell the sheriff that DeMars was driving the blue pickup on September 16 between 7:30 and 8 p.m. Lord said that he would give his truck and a Yamaha dirt bike to anyone who would claim to have been driving the blue pickup at that time. After the visit, DeMars said Lord called him several times to see if he had found such a person.

Lord made incriminating statements while in jail. In a conversation with Sonny Belgard, an inmate trusty, Lord stated "hypothetically" that he had "bonked" Tracy on the head with a mallet or hammer, then panicked and "left, came back and wrapped up her body in the blanket and threw it in the back of his truck and dumped her." Belgard testified that Lord was shaking as he told this story. Lord said it was an accident and

that he wished it had not happened. He told Belgard that he was afraid of the prosecutor, because the prosecutor would "eventually piece this together."

Rex Harvey was also a trusty at the Kitsap County Jail while Lord was there. He testified that while he was mopping the floor near Lord's cell, Lord asked if he "wanted to hear a story." When Harvey did not respond, Lord said: "I hit her in the head with a hammer, raped her in the back of my truck and threw her in the ditch." Two or three days later, Lord commented to Harvey, again without prompting: "I asked her to go cruising around with me at the house I was remodeling, that's where she kept her horse. I hit her in the head with a hammer, raped her in the back of my truck, threw her in a ditch". He told Harvey that he "got blood on a U-Haul blanket."

Lord was charged with aggravated first degree murder and felony first degree murder. The State filed timely notice of intent to seek the death penalty. After deliberations, the jury found Lord guilty of first degree murder. By use of a special verdict form, the jury also found that Lord had committed aggravated first degree murder. The aggravating factors were: (1) the murder was committed to conceal the crime of first or

second degree rape or first or second degree kidnapping; (2) the murder was committed to protect or conceal the identity of any person committing the crime of first or second degree rape, or first or second degree kidnapping; and (3) the murder was committed in immediate flight from the crimes of first or second degree rape or first degree kidnapping.

The jury was then reconvened for a special sentencing hearing. After the jury found that there were no sufficient mitigating circumstances to warrant leniency, Lord was sentenced to death. Lord appealed directly to this court pursuant to the mandatory review provision of Washington's death penalty statute, RCW 10.95.100.

Lord raises a number of issues based on alleged procedural and constitutional errors in both the guilt phase and the penalty phase of his trial. Errors alleged in connection with the guilt phase of a capital case are reviewed no differently than those in noncapital cases. However, as will be made clear in the discussion of the penalty phase, claims of error raised in connection with the sentencing phase of a capital case are subjected to heightened scrutiny.

A number of the errors alleged by Lord are raised for the first time on appeal. The general rule is that appellate courts will not address issues not raised in the trial court. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). However, procedural rules are more liberally construed in capital cases. State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986). Further, claims based on a "manifest error affecting a constitutional right" may be raised for the first time on appeal. RAP 2.5(a)(3). Our review begins with errors alleged in connection with the guilt phase.

## GUILT PHASE

### Trace Evidence

The State presented expert testimony by members of the Washington State Crime Laboratory (crime lab) on microanalysis and blood comparison analysis. Microanalysis is the identification and comparison of minute particles and objects. In this case, hair, fibers, metal fragments, paint chips, wood chips, charcoal, and plaster were analyzed. The blood was typed using electrophoresis. The presence of seminal fluid was detected using an acid phosphatase test. Hair and fiber comparisons were done with a comparison microscope, which

consists of two microscopes connected by an optical bridge with a single set of eyepieces. Paint chips and metal fragments were tested with infrared spectroscopy, x-ray fluorescent spectroscopy, epi-illumination microscopy and a microspectrophotometer.

Lord claims that none of these tests were independently validated as generally accepted in the scientific community and, thus, do not meet the standards of admissibility as set forth in Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923) (adopted by this court in State v. Woo, 84 Wn.2d 472, 473, 527 P.2d 271 (1974)). Frye requires that novel scientific evidence be based on scientific principles and methods which are sufficiently established to have gained general acceptance in the scientific community. Frye, at 1014.

The scientific principles and methods used by the crime lab for blood comparison and microanalysis are generally accepted and are admitted regularly in courts all over the country. Evidence of blood typing using electrophoresis has been admitted in most courts long before the Lord trial, as well as since. See, e.g., People v. Smith, 215 Cal. App. 3d 19, 25, 263 Cal. Rptr. 678 (1989) (not error for trial judge to take

judicial notice of previous findings of acceptability of electrophoresis); Santillanes v. State, 104 Nev. 699, 703-05, 765 P.2d 1147 (1988) (there was sufficient evidence of the test's trustworthiness and reliability to permit results); State v. Adams, 418 N.W.2d 618, 621 (S.D.1988) (sufficient documentation of reliability and criticism of test goes to credibility, not admissibility); People v. Partee, 157 Ill. App. 3d 231, 261-63, 511 N.E.2d 1165 (1987) (forensic serologist's testimony of results of electrophoresis admissible, and reliability is question of weight), cert. denied, 484 U.S. 1072 (1988); Graham v. State, 168 Ga. App. 23, 23-26, 308 S.E.2d 413 (1983) (testimony of expert admissible); Robinson v. State, 47 Md. App. 558, 574-76, 425 A.2d 211 (1981) (electrophoresis found to be accepted in scientific community of forensics). But see People v. Lewis, 160 Mich. App. 20, 27, 408 N.W.2d 94 (1987) (electrophoresis has not achieved general scientific acceptance (relying on People v. Young, 425 Mich. 470, 391 N.W.2d 270 (1986))).

The acid phosphate test is a regularly accepted procedure for determining whether sexual activity has occurred. It is used in rape cases routinely. See, e.g., Evans v. State, 547 So. 2d 38,

39 (Miss. 1989) (acid phosphate test part of rape evidence kit collected by examining physician); State v. Neal, 535 So. 2d 757, 760 (La. Ct. App.1988) (testimony of criminalist); Commonwealth v. Willie, 400 Mass. 427, 430, 510 N.E.2d 258 (1987) (testimony of serologist); Andrade v. State, 700 S.W.2d 585, 586 (Tex. Crim. App. 1985) (testimony of county medical examiner), cert. denied, 475 U.S. 1112 (1986); State v. Singleton, 102 N.M. 66, 68, 691 P.2d 67 (Ct. App. 1984) (testimony of forensic serologist); State v. Harper, 637 S.W.2d 170, 171, 173 (Mo. Ct. App. 1982) (court ordered defendant to submit to acid phosphate test and a police serologist testified as to the results).

In State v. Fagundes, 26 Wn. App. 477, 483, 614 P.2d 198, review denied, 94 Wn.2d 1014 (1980), our Court of Appeals allowed expert testimony as to the presence of acid phosphatase. The expert witness from the crime lab, who was also called at the Lord trial, testified extensively about her testing methods and their general acceptability in the scientific community.

Dr. Edward Suzuki testified at trial that infrared spectroscopy and x-ray fluorescent spectroscopy are widely

accepted in the scientific community. See State v. Ford, 110 Wn.2d 827, 835, 755 P.2d 806 (1988) (scientific principles of infrared spectroscopy established and accepted). These methods of microanalysis have also been generally admitted in court. See, e.g., Irvin v. State, 28 Ark. App. 6, 12, 771 S.W.2d 26 (1989) (testimony of criminologist regarding x-ray fluorescence); State v. Crabb, 107 Idaho 298, 305, 688 P.2d 1203 (Ct. App. 1984) (testimony of criminalist regarding infrared spectroscopy); State v. Needs, 99 Idaho 883, 887, 591 P.2d 130 (1979) (x-ray fluorescence evidence admitted); People v. Trock, 45 Ill. App. 3d 294, 297, 359 N.E.2d 836 (1977) (testimony of FBI crime lab employee on testing of bone with x-ray fluorescence); Commonwealth v. Shea, ___ Mass. App. Ct. ___, 545 N.E.2d 1185 (1989) (infrared spectroscopy used in drug identification); People v. Jones, 118 Misc. 2d 687, 688-94, 461 N.Y.S.2d 962 (Albany Cy. Ct. 1983) (Intoximeter 3000 breath test based on infrared spectroscopy admissible); State v. Dorsey, 58 Or. App. 521, 523, 648 P.2d 1304 (1982) (intoxilyzer test based on infrared spectroscopy admitted (relying on State v. Moore, 307 A.2d 548, 549 (Del. Super. Ct. 1973))).

Although research did not reveal any cases dealing specifically with epi-illumination microscopy, this method of analysis is also valid. It utilizes a microscope with illumination coming down from the side of the sample and reflected off the sample, rather than passing light upward through the sample as regular microscopes do. It is helpful in analyzing nontransparent particles such as paints and metals. The general acceptability of microscopes is unquestionable.

Spectrophotometers are also widely used in criminal cases to examine evidence. See, e.g., State v. Anderson, 41 Wn. App. 85, 99, 702 P.2d 481 (1985) (criminologist testified as to use of spectrophotometer to chemically compare red markings on shell casings), rev'd on other grounds, 107 Wn.2d 745, 733 P.2d 517 (1987); Williams v. State, 251 Ga. 749, 756, 312 S.E.2d 40 (1983) (results of fiber comparison using microspectrophotometer admitted); State v. DeMille, 763 P.2d 5, 8 (Hawaii Ct. App. 1988) (instrument used in blood alcohol analysis); State v. Lawson, 393 So. 2d 1260, 1266 (La. 1981) (expert testimony concerning results of mass spectrophotometer test performed on drugs admitted); Munson v. State, 758 P.2d 324, 329 (Okla. Crim. App. 1988) (testimony of criminalist who

used spectrophotometer in metal comparison), cert. denied, 488 U.S. 1019 (1989); State v. Dorsey, 58 Or. App. 521, 523 n.2, 648 P.2d 1304 ("'spectrophotometers are routinely used by chemists to test for the presence and quantity of certain compounds'" (quoting Dayton v. Schenck, 63 Ohio Misc. 14, 16, 409 N.E.2d 284 (Dayton Mun. Ct. 1980))), review denied, 294 Or. 295 (1982); Commonwealth v. Seville, 266 Pa. Super. 587, 589, 405 A.2d 1262 (1979) (spectrophotometer used in enzyme analysis to show blood alcohol content).

Lord contends that the trial judge erred in allowing the witnesses to testify that particular items of trace evidence "could have" shared a common source or that they had "similar" characteristics. This speculative testimony, claims Lord, violates his equal protection and due process rights. Lord's arguments amount to a claim that, notwithstanding the general acceptance of the methods used here, the trace evidence was inadmissible because the conclusions testified to by the expert witnesses were not sufficiently reliable.

Lord cites no authority establishing that criminal and civil litigants are similarly situated for the purpose of equal protection analysis. Accordingly, we decline to reach this issue.

See State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

As for Lord's due process claim, we note that expert testimony couched in terms of "could have", "possible", or "similar" is uniformly admitted at trial. The lack of certainty goes to the weight to be given the testimony, not to its admissibility. This is so, in part, because the scientific process involved often allows no more certain testimony.

In State v. Batten, 17 Wn. App. 428, 563 P.2d 1287, review denied, 89 Wn.2d 1001 (1977), the defendant argued that the "could have" language of the expert witness's testimony pertaining to hair analysis lacked sufficient certainty to give efficacy to the witness's opinion. The Court of Appeals held that the conclusion offered by the witness reflected the state of the art of scientific comparison of hair. Batten, 17 Wn. App. at 437, 563 P.2d 1287. See A. Moenssens, F. Inbau & J. Starrs, Scientific Evidence in Criminal Cases § 8.09 (3d ed. 1986) (no known way of positively identifying hair as having come from a particular individual). See also State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (an expert's use of "could have" or "possibility" has been allowed in cases where less than an exact

scientific process is involved), review denied, 104 Wn.2d 1016 (1985).

The weight to be given the expert's conclusion is generally left to the jury. Batten, 17 Wn. App. at 438. See also United States v. Brady, 595 F.2d 359, 363 (6th Cir.), cert. denied, 444 U.S. 862 (1979); United States v. Oaxaca, 569 F.2d 518, 526 (9th Cir.) (necessarily imprecise nature of the hair identification went to the weight of the testimony, rather than its admissibility), cert. denied, 439 U.S. 926 (1978); United States v. Cyphers, 553 F.2d 1064, 1072-73 (7th Cir.), cert. denied, 434 U.S. 843 (1977); United States v. Baller, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975); Jent v. State, 408 So.2d 1024, 1029 (Fla.1981) (that hair analyst could not positively identify hair as defendant's went to weight, not admissibility), cert. denied, 457 U.S. 1111 (1982); People v. Novak, 94 Ill. App. 3d 1024, 1028, 419 N.E.2d 393 (1981) (testimony of microanalyst that hairs similar admissible and not too speculative, but weight up to jury); Paxton v. State, 159 Ga. App. 175, 179, 282 S.E.2d 912 (expert testimony that hairs could have common origin not pure speculation and question was not of admissibility but weight), cert. denied, 248 Ga. 231,

283 S.E.2d 235 (1981), aff'd, 735 F.2d 1306 (11th Cir.), cert. denied, 469 U.S. 935 (1984); People v. Allweiss, 48 N.Y.2d 40, 50, 421 N.Y.S.2d 341, 396 N.E.2d 735 (1979) (generally conclusive results are not required and value of hair analysis, with its limitations, is recognized).

In sum, the methods used by the Washington State Crime Laboratory are generally accepted within the scientific community. Further, an expert's lack of certainty goes to the weight of the testimony, not its admissibility. Accordingly, we conclude that the trace evidence was properly admitted.

Summary Charts

Lord contends that he was denied due process by the admission of demonstrative evidence in the form of two summary charts and by the decision to send the charts to the jury room during deliberations. The charts, exhibits 141 and 143, summarized the State's trace evidence. Lord argues that the admission and use of the charts during deliberations amounted to an unconstitutional comment on the evidence. Furthermore, he argues that the charts should not have been admitted because they reduced the experts' speculative testimony to

nonspeculative terms and, as such, were improperly conclusory and argumentative.

The use of demonstrative or illustrative evidence is to be favored and the trial court is given wide latitude in determining whether or not to admit demonstrative evidence. State v. Chapman, 84 Wn.2d 373, 378, 526 P.2d 64 (1974); 5 K. Tegland, Wash.Prac., Evidence § 94, at 300 (3d ed. 1989). Illustrative evidence is appropriate to aid the trier of fact in understanding other evidence, where the trier of fact is aware of the limits on the accuracy of the evidence. Norris v. State, 46 Wn. App. 822, 827, 733 P.2d 231 (1987). A summary "can help the jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of a multitude of witnesses throughout the trial." United States v. Lemire, 720 F.2d 1327, 1348 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

Because a summary chart submitted by the prosecution can be a very persuasive and powerful tool, the court must make certain that the summary is based upon, and fairly represents, competent evidence already before the jury. United States v. Conlin, 551 F.2d 534, 538 (2d Cir.), cert. denied, 434 U.S. 831

(1977). This does not mean, however, that there can be no controversy as to the evidence presented. Rather, the chart must be a substantially accurate summary of evidence properly admitted. The jury is then free to judge the worth and weight of the evidence summarized in the chart. Epstein v. United States, 246 F.2d 563, 570 (6th Cir.), cert. denied, 355 U.S. 868 (1957).

The fact that summary charts can be a very persuasive tool also gives rise to concerns associated with their use. The jury might rely upon the alleged facts in the summary as if these facts had already been proved or as a substitute for assessing the credibility of witnesses. United States v. Scales, 594 F.2d 558, 564 (6th Cir.), cert. denied, 441 U.S. 946 (1979). There is also the possibility that the jury will treat the summary as additional evidence or that the summary will provide extra summation for the government. Lemire, at 1348. These reservations have led to the requirement of "guarding instructions" to the effect that the chart is not itself evidence, but is only an aid in evaluating the evidence. Scales, at 564; Lemire, at 1347.

Such instructions are not the only protection against the concerns sometimes associated with summary charts. The trial court has a duty to ensure that such charts are substantially

accurate. The court fulfills this duty, in part, by allowing the defense full opportunity to object to any portions of the summary chart before it is seen by the jury. Moreover, the concern that the jury might rely upon the alleged facts in the summary as if they had already been proved is minimized by allowing complete cross examination of any witnesses testifying in connection with the summary. Lemire, at 1348.

When a summary or chart is used for illustrative purposes only and the jurors are instructed that the summary is not evidence, the summary should not go to the jury room. McCartney v. Old Line Life Ins. Co. of Am., 3 Wn. App. 92, 93-94, 472 P.2d 581, review denied, 78 Wn.2d 995 (1970); 5B K. Tegland, Wash.Prac., Evidence § 495, at 386 (3d ed. 1989).[5] It should be utilized only during the initial presentation of testimony and/or in final argument by counsel. McCartney, at 93-94. However, if the chart is sent with the jury, reversal is required only if, upon a review of the entire record, the court determines that the defendant was prejudiced. United States v. Abbas, 504 F.2d 123, 125 (9th Cir.1974), cert denied, 421 U.S.

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[5] In contrast, a summary of complicated or voluminous writings, recordings, or photographs admitted pursuant to ER 1006 is substantive evidence that does go to the jury room. 5B K. Tegland § 495, at 386.

988 (1975). Thus, there are two questions which need to be addressed: (1) were the charts properly admitted for illustrative purposes, and (2) was Lord prejudiced by the charts being sent to the jury room?

The charts at issue are State's exhibits 141 and 143. Exhibit 143 summarized the testimony of a number of experts and reflected testimony regarding trace evidence of charcoal, blood, paints, plaster, metal flakes, fibers, and wood chips. This chart summarized the testimony of Cindy Jay, Michael Tom Nolan, Chesterene Cwiklik, Lynn McIntyre, Donald Phillips, Michael James Grubb, and John Anthony Brown. Exhibit 141 was a much smaller chart, which summarized Edward M. Suzuki's testimony on trace evidence consisting of metal flakes and paint chips. The portion of his testimony relating to white paint chips was reflected on exhibit 143.

We begin our analysis by noting the unusual complexity of the scientific evidence in this case. During the 37 days of trial, the jury heard testimony from expert witnesses regarding trace evidence on all or part of 18 days. Testimony of the State's experts spanned 1,364 pages. Brown alone gave 539 pages of testimony over a period of 5 days. Dr. Suzuki's testimony filled

183 pages of trial transcript. Exhibit 143, which is the primary focus of Lord's challenge, was set out in the form of a grid. See appendix. Across the top, there were 30 categories of trace evidence. Down the left side, there were 25 items or locations where trace evidence was found. There were a total of 118 "dots" on the chart indicating some correlation between the specific trace evidence and items or location.

Trace evidence by its nature is not evidence which a jury can readily examine. Any conclusion to be drawn from the evidence of necessity required microscopic and scientific testing. The jury could certainly view the evidence, but there was no way it could realistically compare, for example, one wood chip with another. Moreover, the evidence, if measured by the number of types of evidence and the number of items and locations, was voluminous. The transcript of trial testimony was 36 volumes and 5,674 pages long. The charts served to help the jury understand and organize factually complex evidence introduced by many witnesses during a lengthy trial.

Importantly, the jury was repeatedly made aware of the limits of the evidence reflected in the charts. Each expert was examined as to his or her qualifications, experience, methods,

and the limits of the method of testing used. Cross examination of each of the experts was vigorous, and the trial judge allowed defense counsel wide latitude in scope and degree. It also appears that the trial court made every reasonable effort to ensure that the charts were substantially accurate. The court ruled that the charts could be modified to the extent they were inaccurate, took great care to ensure that defense counsel had full opportunity to make objections to the information on the charts before they were shown to the jury, and invited the defense to make its own chart. While the defense did not prepare a chart of its own, a number of changes were made to the State's charts both at Lord's request during expert testimony and in response to objections made before the jury saw the relevant portions of the charts.

During his testimony, Dr. Suzuki made a number of additions to exhibit 141 at Lord's request: He added the words "different microscopic appearances" and "different compositions" to the exhibit. He also wrote "2 fragments S-08 not received for analysis." Similarly, during his testimony, Dr. Brown made a number of changes and additions to exhibit 143, again at Lord's request. A dot for the broom was added under

the # 1 red paint category. The word "truck" was crossed out in the category "carpet fibers, truck" and "pale-brown nylon carpet fibers" was changed to "brown nylon carpet fibers." A "royal-blue cotton fabric" category was added with dots added for the red sweatshirt and orange U-Haul blanket. The word "royal" was added to the category labeled "blue polo shirt". Three footnotes were added to exhibit 143: Footnote 1 indicated that Brown could not determine when orange fibers found on the blue U-Haul blanket and on a rope, which was in the blue pickup, had been deposited on those items. Footnote 2 indicated that there was a black undercoat on the paint samples taken from the truck. Footnote 3 indicated that the royal blue cotton fibers found were dissimilar from the control fibers taken from the royal blue polo shirt.

Changes were also made in response to defense objections prior to the jury seeing the relevant portions of the charts. On exhibit 143, the category labeled "presumptively blood" was changed to read "consistent with blood".[6] A "burnt

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[6] In identifying this category for the court, defense counsel specifically noted, but did not object to, the fact that the column had dots next to the shoes, door, floor, and hammer despite being asked if there were any other specific objections.

fabric" category was deleted. The chart was changed to reflect that there were two fence paint samples, not one. Similarly, exhibit 141 was corrected regarding the location of metal fragments found near the workshop.

The trial court declined to make some of the requested changes. The court ruled that, contrary to Lord's assertion, the testimony did support the presence of wood chips in the autopsy clothes. Lord also objected to the categories of "coarse body hair (defendant)", which was related to the orange U-Haul blanket, and "coarse body hair", which was related to the towel. Lord objected to both categories on the basis that the description did not comport with testimony that the hair could be chest hair or pubic hair, more likely chest hair. The court ruled that it was not inconsistent with testimony that had been given and that Lord was free to cross-examine as to any dispute in the testimony.[7] These rulings are supported by the record. Lord also objected to the word "defendant", on the basis that the testimony was that Lord could not be excluded as the source of the hair on the blanket. In response, the court ruled that because the issue of common source was the subject

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[7] Cindy Jay testified that she uses the term "coarse body hair" in connection with both chest hair and pubic hair.

of dispute between the experts, it was "not inaccurate for [the category notation] to identify a hair as having come from the defendant when there was expert testimony on that fact." Furthermore, any possible prejudice from this evidence was eliminated by Lord's concession during closing argument that he had contact with the orange blanket. Cf. United States v. Abbas, 504 F.2d 123, 125-26 (9th Cir.1974), cert. denied, 421 U.S. 988 (1975).

After determining that the charts were substantially accurate, the trial court admitted them as illustrative summaries with a limiting instruction:

> Exhibits Numbers 141 and 143 have been admitted in evidence. These exhibits have no independent existence or evidentiary value in and of themselves. The evidentiary value to be given these exhibits is entirely dependent upon the testimonial and/or documentary proof upon which they are based, and upon the accuracy and credibility of the testimonial and/or documentary proof upon which the exhibits are based. The exhibits are admitted to assist you in considering the evidence and for that purpose you are entitled to consider them.

Instruction 8.

We conclude that the admission of the charts for illustrative purposes was not an abuse of discretion. The charts were an appropriate and necessary aid to the jury in

understanding and organizing the voluminous trace evidence. Without the aid of the charts, the State would have been severely hampered in the presentation of its case and, in effect, denied the use of legitimate and crucial scientific evidence. The jury was made well aware of the level of certainty the experts were able to testify to through lengthy and exhaustive cross examination. Defense counsel was given ample opportunity to make objections to disputed entries and chose not to present its own chart. Finally, a proper limiting instruction was given. If we were to disallow the use of the summary chart, it would be difficult to conceive of the circumstances in which it would be permitted.

Turning to the trial court's decision to send the charts to the jury room, we noted earlier that generally charts should not be sent to the jury room. However, reversible error does not occur unless a review of the entire record establishes that Lord was prejudiced. United States v. Abbas, supra; see also United States v. Cox, 633 F.2d 871, 874 (9th Cir.1980); United States v. Krasn, 614 F.2d 1229, 1238 (9th Cir.1980). Prejudice resulting from sending a summary chart to the jury can be prevented by the same protective and precautionary procedures the trial court

uses to ensure accuracy when considering admissibility. The court in Abbas simultaneously analyzed the admissibility of the charts and the possible prejudice from sending the charts to the jury. Abbas, at 125. In concluding that the defendant had not been prejudiced, the court there noted that the defense had an opportunity to cross-examine the witnesses relative to the charts, to correct any purported errors, and to present its own chart. Abbas, at 125. As noted above, the chart here was an accurate representation of evidence already before the jury.

To ensure that no prejudice resulted from the error, however, we must further ask if the chart unduly emphasized the State's case against Lord. For the following reasons, we find that it did not. First, the court properly instructed the jury that the charts had no evidentiary value of their own and were to be considered in light of the accuracy and credibility of the supporting testimony. The jury is presumed to have heeded the instructions of the court. State v. Grisby, 97 Wash.2d 493, 499, 647 P.2d 6 (1982), cert. denied sub nom. Frazier v. Washington, 459 U.S. 1211 (1983).

Second, after 18 days of expert testimony, the jurors were well aware that the conclusions to be drawn from the charts

were subject to qualification. In addition to their recollection, jurors were allowed to take notes during the trial, to which they could refer during deliberations. The jurors' notes, no doubt, supplemented and explained the expert testimony and further refined the chart.

Additionally, had the court allowed the State to present a chart, and then denied the defense the same opportunity, a stronger argument could be made that Lord had been prejudiced thereby. However, the court expressly allowed the defense to make its own chart. The defense did not present an alternative summary chart, but instead relied on the changes made to the charts admitted into evidence. Furthermore, the chart had been altered in response to defense requests and objections. Thus, Lord's denotations were preserved for the jury. The submission of the charts to the jury did not prevent the defendant from presenting any contradictory evidence. The charts, therefore, did not favor the State's case, but presented a balanced summary.

Finally, in assessing the prejudicial impact of any given item, it is necessary to view that evidence in the context of the entire trial. The State's case against Lord included his proximity to the victim in time and location, his prescient comments about

her demise and whereabouts, his bizarre behavior in cleaning at the scene of the crime, his attempts to buy alibi witnesses, his incriminating statements to trusties, the contradictory statements to police officers, and the vast array of scientific evidence that inextricably linked Lord to the blue pickup, the shop, the clothes, the orange U-Haul blanket, and, ultimately, to Tracy's body. In addition, the trial judge made every possible effort to ensure that the charts were reliable and that the jurors understood the proper use of the charts. Based on our review of the record, we cannot say that allowing the charts to go to the jury room during deliberations unduly emphasized the State's case to Lord's prejudice.

Lord next argues that the admission of the charts violates Const. art. 4, § 16, which provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of article 4, section 16 "'is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.'" Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971) (quoting Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655, 18

A.L.R.2d 983 (1950)). For example, in Arensmeyer, the trial court's interruption of counsel during closing argument to say he was mistaken as to the evidence was an unconstitutional comment on the evidence. "To constitute a comment on the evidence, it must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements." State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

Lord does not contend that the trial court made any statements in front of the jury regarding its opinion of the charts. Rather, Lord argues that the chart alone "transforms the expert testimony from its speculative form to absolute certainties." Brief of Appellant, at 81. He then concludes that the act of admitting the chart and sending it to the jury "subtly indicated to the jury that the State's witnesses were in fact credible and that the factual issue of common source [of the trace evidence] should be resolved in the State's favor." Brief of Appellant, at 82. We disagree. The extreme care which the trial judge used in dealing with exhibit 143 has already been discussed at length. Lord does not support his accusation of subtle influence with a single reference to the record. The trial court is charged with

using its discretion to ensure that proper evidence is admitted and improper evidence is excluded. The admission of evidence, standing alone, cannot be considered an unconstitutional comment on the evidence.

Internal Investigation

The conduct of Donald Phillips, a forensic scientist who had been employed as a supervisor of criminalistics at the crime lab during and after the murder investigation, is the subject of several errors alleged by Lord. The trial court ruled on a number of motions related to Phillips' testimony. We begin with a summary of these motions and the related facts.

Prior to trial, Lord moved to exclude any testimony by Phillips because he had not yet received a report from Phillips related to the investigation of the crime scene or been able to arrange an interview with Phillips. In response to Lord's motion, the court ordered that Phillips be deposed with both parties present.

During the deposition, Lord learned that Phillips had used leuco-malachite green to test for the presence of blood at Kirk Lord's workshop. On some items, he used a 2-step process where a colorless dye is applied, and then an oxidizing agent is

applied in a separate step. On other items, Phillips used a 1-step method, where the dye and oxidizing agent are premixed and then applied by spraying the item being tested. The hammer, which the State submitted was the murder weapon, was tested using the latter method. Defense again moved to exclude Phillips' testimony contending that the 1-step method used by Phillips was not generally accepted within the scientific community.

As a result of Phillips' deposition, Lord became aware of an internal investigation by the crime lab of Phillips' conduct in connection with the murder investigation. Lord made an oral motion for production of the records related to the investigation, which the trial court granted. Upon receipt of a summary of the investigation materials, Lord moved for dismissal, a mistrial, or an order excluding the testimony of Phillips and detectives Hudson and Wright in connection with testing for blood at the workshop. Lord also requested an evidentiary hearing.

The court released notes and tapes of the interviews with crime lab personnel in connection with the internal investigation to both counsel and conducted an extensive evidentiary hearing regarding Phillips' activities and the internal investigation. The

court then ordered the crime lab to provide both counsel copies of all the records and summaries of statements given concerning the investigation of Phillips, the notes of Brown and Sweeney, and the official written report, attached diagram, and notes submitted by Phillips.

The records released by the crime lab indicated that a complaint regarding Phillips' conduct during the homicide investigation was received on November 26, 1986. The complaint alleged that Phillips had used the 1-step method to test for blood at the workshop after Sweeney had instructed him to use a 2-step or drop method. The complaint further alleged that Phillips had lied by telling Sweeney he had used the drop method and had falsified his report to say that he had swabbed the hammer. The complaint went on to state that Phillips had asked detectives Wright and Hudson to indicate in their report that they--not Phillips--had found the hammer at the workshop. Finally, the complaint noted an odd occurrence where Phillips told a fellow employee that a vision or dream had revealed that the hammer was the murder weapon.

When Phillips learned he was being investigated, he went on 30-day sick leave and began taking medication,

including antidepressants. Phillips resigned from the lab on December 26, 1986 before the investigation was completed.

The court denied Lord's motions, after specifically finding that there had been no misconduct on the part of either the prosecutor or the sheriff's office. The court went on to say that if any misconduct had occurred, it was within the lab and, thus, went only to credibility. In denying the motion, the court noted that defense counsel had never been misled by the false report because counsel knew from both the interviews with detectives Hudson and Wright, and from Phillips' deposition, that Phillips had used the 1-step method to test for blood at the workshop. Furthermore, Lord acquired abundant impeachment evidence through the hearing and crime lab investigation documents. The court concluded that there was insufficient prejudice to grant a mistrial or dismissal, or to suppress evidence; any prejudice had been cured by the discovery.

Turning to Lord's allegations, he first argues that the trial court erred in allowing Phillips to testify regarding the use of leuco- malachite green as a presumptive test for blood.[8] He

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[8] Lord does not contend that Phillips lacks the qualifications to testify as an expert witness on the use of leuco-malachite green, nor that leuco-malachite green as a presumptive test for blood fails to satisfy the

argues that Phillips' testimony regarding the testing at the workshop should have been excluded because the 1-step spray method Phillips used does not comport with the generally accepted standard in the scientific community. Before ruling on the admissibility of testimony on leuco-malachite green, the trial court heard testimony from John Thornton, Ph.D.

Thornton, Lord's own expert witness, testified that leuco-malachite green is a generally accepted presumptive test for blood and testified that both methods are used. He testified that while the 2-step method gives slightly more specificity than the 1-step method (because some false positives can be ruled out), both tests are presumptive, not conclusive, for the presence of blood. Thornton had reservations about the spraying method, which he believed was an "improvident" method of proceeding. However, he testified that the 1-step spray method is used when searching for blood where the area has been cleaned and there is

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relevancy and reliability requirements of the Frye test. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ER 702. Phillips testified as to his education, experience and training as a forensic scientist and crime scene investigator. The determination that a witness is properly qualified to express an opinion as an expert is within the sound discretion of the trial court. State v. Nelson, 72 Wn.2d 269, 276, 432 P.2d 857 (1967).

no blood visible to the naked eye. Spraying is also appropriate when searching for a pattern of blood. He noted that the decision on how to proceed is a judgment call to be made by the investigator.

The jury heard considerable testimony on this subject from both Phillips and Thornton. The defense had adequate opportunity to cross-examine Phillips regarding his actions at the workshop. Thornton's rebuttal testimony spanned 32 pages. The trial court correctly concluded that Lord's argument went to the weight, not the admissibility, of the evidence.

Lord next argues that his due process right to a fundamentally fair trial was violated by the admission of the hammer because Phillips sprayed it with leuco-malachite green, thereby precluding more specific testing. In effect, he claims that the State intentionally destroyed exculpatory evidence.

Under the due process clause of the Fourteenth Amendment,[9] it must be demonstrated that the State's prosecution of Lord comported with prevailing notions of

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[9] Lord does not raise a claim under the due process clause of the Washington Constitution, article 1, section 3. Thus, our discussion is limited to federal law. See State v. Straka, 116 Wn.2d 859, 883, 810 P.2d 888 (1991).

fundamental fairness such that Lord was afforded a meaningful opportunity to present a complete defense. To ensure that Lord was given this opportunity, the prosecutor had a constitutional duty to give Lord any exculpatory evidence that would raise a reasonable doubt about his guilt. California v. Trombetta, 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528, 2532 (1984).

Specifically, Lord contends that, had Phillips used the 2-step swab method to test the hammer, additional tests could have been done to determine conclusively if there was blood on the hammer and, if so, whether it was Tracy's. If such tests had shown that the blood was not Tracy's, he further argues, a conviction would then have been highly unlikely. Because the opportunity to perform specific tests on the hammer was lost once it had been sprayed, Lord claims that Phillips' actions are tantamount to a failure by the State to preserve material exculpatory evidence. He concludes that he was thus denied a fair trial.

The argument Lord makes was rejected in Arizona v. Youngblood, 488 U.S. 51, 57-58, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988). In Youngblood, the defendant was convicted of child molestation and sexual assault. A sample collected from

the victim was used to show that a sexual attack had occurred. Police procedure did not routinely require tests for blood grouping and none were performed. When the sample was again tested at a later date, the test failed to detect any blood group substances. The victim's clothes were also tested for semen more than 2 months after the attack. The clothes had not been refrigerated in the interim. They tested positive for semen, but testing for blood group typing was unsuccessful. The defendant claimed that his due process rights had been violated because, had the samples been tested shortly after they were gathered, or the clothes properly refrigerated, there might have been evidence eliminating him as the assailant. Youngblood, at 52-54.

In Youngblood, the Court found that no due process violation had occurred. The Court noted that if a due process claim is based on the State's failure to disclose material exculpatory evidence, good or bad faith on the part of the State is irrelevant. Youngblood, at 57 (citing Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194 (1963)). However, the Court distinguished cases where the State fails "to preserve evidentiary material of which no more can be said than that it

could have been subjected to tests, the results of which might have exonerated the defendant." Youngblood, at 57. Youngblood held that, absent bad faith, failure to preserve merely potentially useful evidence does not constitute a denial of due process of law. Youngblood, at 57-58.

Lord's contention should be analyzed using the rule set forth in Youngblood. Lord's claim that the hammer could have yielded more information is no different from the claim in Youngblood. The State failed to preserve potentially useful evidence that "could have been subjected to tests, the results of which might have exonerated" him. Youngblood, at 57. Thus, absent bad faith on the part of Phillips, there is no due process violation.

Although Lord characterizes the spraying of the hammer by Phillips as the "destruction" of evidence, there is no evidence that Phillips acted intentionally. The hammer was lying underneath the coiled extension cords and was sprayed inadvertently. Phillips did not see the hammer until after he sprayed the cords. When he realized what he had done, Phillips unsuccessfully tried to save a sample for further testing by using a swab to take material from the claw of the hammer.

Phillips' actions did not constitute bad faith.[10] Additionally, as in Youngblood, nothing about the State's handling of the hammer was concealed at trial, and the defense had access to the hammer for testing. Youngblood, at 58.

In addition, there was independent testimony connecting the hammer to the crime. Two detectives and Phillips all testified to seeing a positive reaction consistent with blood on the hammer. The medical examiner testified that Tracy's wounds could have been inflicted by a hammer. Lord was a carpenter who used tools at his brother's workshop. The hammer was properly admitted and no due process violation occurred.

Lord next claims that his due process right to a fair trial was violated when Phillips falsified the report he submitted to his supervisors. We disagree. As the trial court noted, Lord never relied on the false information in the report. He was aware from interviews with the detectives that the hammer had

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[10] Lord relies on California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984) to argue that there was bad faith rising to the level of a due process violation. Trombetta is inapposite. Under Trombetta, for a violation of due process to be found, the evidence must possess an exculpatory value that was apparent before it was destroyed. Trombetta, at 489.

been sprayed. When he was deposed, Phillips truthfully stated that he had sprayed the hammer. Thus, the defense was not deliberately misled. Rather, Phillips' actions implicate his credibility as a witness. Because the evidentiary hearing provided Lord with a wealth of impeachment evidence against Phillips, in a sense, rather than denying Lord a fair trial, the false report actually assisted defense counsel's attempts to impeach his testimony.

Finally, Lord contends that the trial court improperly limited the scope of his cross examination of Phillips regarding any possible mental defects Phillips may have had and the statements Phillips made about a vision that the hammer was the murder weapon.

Generally, cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. However, the court may permit inquiry into additional matters. ER 611(b). The scope of cross examination lies within the sound discretion of the trial court. ER 611(b); State v. Hoffman, 116 Wn.2d 51, 96, 804 P.2d 577 (1991). The trial court's ruling will not be disturbed on appeal unless no reasonable person would take the position adopted by

the trial court. State v. Rice, 110 Wn.2d 577, 600, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

In denying Lord's motion in limine, the trial court ruled that Lord could not inquire if Phillips was under psychiatric care at the time of the homicide investigation. However, Lord could ask if Phillips was on medication during the relevant time. Lord agreed that inquiry was only relevant in relation to the use of medications. The court's ruling was correct.

The trial court also ruled that Lord could not inquire about the reference to a vision about the hammer. The court ruled that this statement was more unfairly prejudicial than probative given that Phillips had already admitted his mistake and falsification, and that Nolan had testified about the repeated testings at Phillips' request. We agree. In sum, the trial court did not abuse its discretion in limiting the scope of cross examination of Phillips.

Autopsy Photographs

Lord assigns error to the admission of a number of color photographs taken of Tracy's head and skull during the autopsy. He contends they should have been excluded because they were so gruesome as to be unfairly prejudicial.

The admission of photographs is within the sound discretion of the trial court. State v. Hoffman, 116 Wn.2d 51, 88, 804 P.2d 577 (1991). Photographs have probative value where they are used to illustrate or explain the testimony of the pathologist performing the autopsy. State v. Jones, 95 Wn.2d 616, 628, 628 P.2d 472 (1981). Gruesome photographs are admissible if the trial court finds their probative value outweighs their prejudicial effect. Hoffman, at 88; State v. Harris, 106 Wn.2d 784, 791, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987). " '[A] bloody, brutal crime cannot be explained to a jury in a lily-white manner' ". State v. Crenshaw, 98 Wn.2d 789, 807, 659 P.2d 488 (1983) (quoting State v. Adams, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), rev'd on other grounds, 403 U.S. 947, 29 L. Ed. 2d 855, 91 S. Ct. 2273 (1971)). Here, while the admitted photographs can be considered gruesome, the trial judge clearly was aware of her need to exercise discretion. Although she admitted the photographs at issue, she excluded photographs of Tracy's skull that showed fractures. The exclusion of these exhibits was based on the court's conclusion that diagrams were sufficient to depict the fractures.

Admitted exhibits 26 through 31 are photographs of Tracy's head taken from a number of angles. Each photograph shows a different portion of Tracy's head and the injuries to those areas. During extensive voir dire in connection with an offer of proof, Dr. John Dale Howard, the medical examiner who performed the autopsy, testified that the photographs were taken at his direction to establish identity and to document any injuries pertinent to understanding the death. He testified further that the photographs would be helpful in explaining the nature and depth of injuries to the jury. In his opinion, the photographs were a more accurate representation of the injuries than a simple diagram. This was so because decomposition had altered the wounds. He believed that the jury would benefit from seeing those changes as well as the specific location, size, and nature of wounds. It was important for the jury to see the extent of the decomposition because the resulting alteration of the wounds limited the conclusions he was able to draw about the nature of the wounds.

Given the medical examiner's testimony that the photographs would aid the jury in understanding his testimony and were a more accurate representation of the injuries, we hold

that the trial court did not abuse its discretion in admitting exhibits 26 through 31.

Other Evidentiary Rulings

Lord also assigns error to the trial court's admission of the matchbook found in the blue truck, the photograph of the injury on his arm, and the evidence of his alcohol and marijuana use. We conclude that there was no abuse of discretion in the admission of this evidence.

As to the matchbook, Lord's objection was that it was not relevant because of the passage of time between September 16 and October 1, when the truck was impounded. The trial court correctly concluded that Lord's objection goes to weight, not relevancy.

The photograph of the injury on Lord's arm was properly admitted. While the photograph was taken a month after Tracy's disappearance, there was testimony that Lord had an injury on his arm the evening of September 16.

The evidence of Lord's alcohol and marijuana use was also properly admitted. Lord told Detective Magerstaedt that when he smoked marijuana and drank beer "he becomes a different person and he loses control." The trial court ruled on

the admissibility of evidence of Lord's marijuana use under ER 404(b) and ER 403.[11] ER 404(b) was applicable because marijuana use constitutes a prior bad act. The court found that the evidence was admissible as an explanation for Lord's conduct, not to prove character. It pertained to intent, preparation, opportunity, and provided the jury a possible explanation for the commission of this crime. Under ER 403, the court concluded that the evidence was relevant because the proximity in time, coupled with Lord's own activities and statements, made the statements rationally and probatively related to the crime. Furthermore, any prejudicial aspects of the activity were neither particularly inflammatory nor similar to the crime at issue.

Impeachment of Jail Trusties

Lord argues that the trial court erred by excluding the testimony of witnesses whom the defense intended to call to impeach Sonny Belgard and Rex Harvey, two prisoner trusties.

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[11] ER 404(b) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 403 provides, in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."

Belgard and Harvey testified about incriminating statements Lord made to them while he was in the Kitsap County Jail awaiting trial. The defense offered witnesses to testify regarding Belgard's and Harvey's reputations for truthfulness.

ER 608(a) provides:

> The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

The application of ER 608(a) has been broken down into five elements:

> The first element is the foundation for the testimony--the knowledge of the reputation of the witness attacked. Second, the impeaching testimony must be limited to the witness's reputation for truth and veracity and may not relate to the witness's general, overall reputation. Third, the questions must be confined to the reputation of the witness in his community . . . Fourth, the reputation at issue must not be remote in time from the time of the trial. Finally, the belief of the witness must be based upon the reputation to which he has testified and not upon his individual opinion.

(Footnotes omitted.) 5A K. Tegland, Wash.Prac., Evidence § 231, at 202-04 (3d ed. 1989).

Lord offered three witnesses to testify regarding Belgard's reputation for truthfulness: Donna Lynch, Gayle Gordon, and Sarah Carlson. All three were community corrections officers. The trial court heard offers of proof regarding these witnesses. Lynch was excluded after she testified that she did not have an opinion as to Belgard's reputation for truth and honesty.

Gordon testified that she had had contact with Belgard's family, other correction personnel, judges, attorneys, and law enforcement personnel. Based on these contacts, she testified that Belgard does not have a good reputation for truth and honesty within the criminal justice system.

The trial court excluded Gordon's testimony for several reasons. First, as a community corrections officer, the only contacts she had with people who knew Belgard were with those who interacted with him as a result of his criminal convictions and with his family. The court ruled that these contacts were insufficient for her to have knowledge of his reputation in the community for truth and veracity. Moreover, through contacts with Belgard in the criminal justice system, Gordon formed an opinion about his criminal behavior, but not about a particular

reputation for veracity. Finally, Gordon's testimony was too remote because she had had no contact with Belgard since he had been released from jail several months earlier.[12]

We agree that the criminal justice system does not constitute the community in which Belgard resides. This system is neither "neutral enough [n]or generalized enough to be classed as a community" and an officer in the criminal justice system is not equipped to provide an unbiased and reliable evaluation of an inmate's general reputation for truth telling. Parker v. State, 458 So. 2d 750, 753-54 (Fla.1984), sentence vacated on petition for writ of habeas corpus, aff'd sub nom. Parker v. Dugger, 876 F.2d 1470 (11th Cir. 1989), rev'd and remanded, 111 S. Ct. 731 (1991). In State v. Swenson, 62 Wn.2d 259, 282-83, 382 P.2d 614 (1963), we held that a witness's reputation for truthfulness and veracity among people of her church did not satisfy the requirement that the offered testimony be limited to a general reputation for truth and veracity in the community in which she resided. Gordon's lack of knowledge of Belgard's reputation for

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[12] After the trial court ruled that Gordon's testimony was not admissible under ER 608, it also noted that the testimony would be excluded under ER 403 because "the nature of her contacts with him are strictly through his criminal behavior, which has already been delineated and is before the jury in its proper form."

truthfulness in the general community, coupled with the remoteness in time, support exclusion of Gordon's testimony.

Lord also offered the testimony of Carlson, who had supervised Belgard in a work release program. She testified that her opinion was based on contacts with Belgard's family, people in the court system, and people involved in monitoring his parole. She could not speak to his general reputation for truth and honesty and was aware of his reputation only with his family and herself.

The trial court excluded Carlson's testimony under ER 608. First, she was unable to testify to Belgard's general reputation for truthfulness. Second, even if the definition of general reputation could mean reputation among one's own family, Carlson was not competent to offer an opinion that Belgard was dishonest with his family. The trial court's rulings were correct.

Lord also sought to have Ronald Heeney testify as to Harvey's reputation for truthfulness. Harvey had several prior convictions for theft by color or aid of deception, all of which had been brought out during Harvey's testimony. Heeney was the victim of one of these crimes and had business dealings with

Harvey in 1985. The trial court excluded Heeney's testimony because it was too remote in time and because he was "not able to testify that he knew Mr. Harvey's reputation for truth or honesty." The record supports this ruling. In sum, we find no abuse of discretion in the trial court's exclusion of these four witnesses.

Instructions

Lord assigns error to instruction 13 and Verdict Form A-1, arguing that the jury was improperly allowed to convict him without unanimously determining which underlying crime--rape or kidnapping--served to aggravate his offense. The State has the burden of proving beyond a reasonable doubt that a criminal defendant committed every act necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Further, defendants in criminal trials may only be convicted by unanimous verdict. State v. Mak, 105 Wn.2d 692, 735, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), sentence vacated on petition for writ of habeas corpus, 754 F. Supp. 1490 (W.D. Wash. 1991).

Instruction 13 provided:

NO. 13

If, and only if, you find the defendant guilty of Premeditated First Degree Murder as set forth as Alternative A, Premeditated First Degree Murder, in instruction No. 12 then it will be necessary for you to return a special verdict to the following question:

Did the State prove beyond a reasonable doubt that one or more of the following aggravated circumstances existed?

(a) The murder was committed to conceal the commission of the crime of First Degree Rape or Second Degree Rape or the Crime of First Degree Kidnapping or Second Degree Kidnapping; or

(b) The murder was committed to conceal the commission of the crime of attempted First Degree Rape or attempted Second Degree Rape or the crime of attempted First Degree Kidnapping or attempted Second Degree Kidnapping; or

(c) The murder was committed to protect or conceal the identity of any person committing the crime of First Degree Rape or Second Degree Rape or the crime of First Degree Kidnapping or Second Degree Kidnapping; or

(d) The murder was committed to protect or conceal the identity of any person committing the crime of attempted First Degree Rape or attempted Second Degree Rape or the crime of Attempted First Degree Kidnapping or attempted Second Degree Kidnapping; or

(e) The murder was committed in the course of or in immediate flight from the crime of First Degree Rape or Second Degree Rape or the crime of First Degree Kidnapping.

The State must prove to you beyond a reasonable doubt, as previously defined, one or more of the aggravating circumstances. These aggravating circumstances are alternatives and only one need be proved. You must unanimously agree upon which, if any, of the aggravating circumstances set forth before has been proved. You will be provided with a special verdict form for each aggravating circumstance in which you answer yes or no according to the decision you reach.

If after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any element of any one of the aggravating circumstances, do not fill in the blank for that alternative.

(Italics ours.)

Special Verdict Form A-1 provided:

SPECIAL VERDICT FORM A-1

We, the jury, return a special verdict by answering as follows:

(a) Did the defendant, BRIAN KEITH LORD, commit the murder to conceal the commission of the crime of First Degree Rape or Second Degree Rape or the crime of First Degree Kidnapping or Second Degree Kidnapping?

ANSWER: Yes
(write in "yes" or "no")

(b) Did the defendant, BRIAN KEITH LORD, commit the murder to conceal the commission of the crime of attempted First Degree Rape or attempted Second Degree Rape or the crime of attempted First Degree Kidnapping or attempted Second Degree Kidnapping?

ANSWER: _____
(write in "yes" or "no")

(c) Did the defendant, BRIAN KEITH LORD, commit the murder to protect or conceal the identity of any person committing the crime of First Degree Rape or Second Degree Rape, or the crime of First Degree Kidnapping or Second Degree Kidnapping?

ANSWER: Yes
(write in "yes" or "no")

(d) Did the defendant, BRIAN KEITH LORD, commit the murder to protect or conceal the identity of any person committing the crime of attempted First Degree Rape or the crime of attempted Second Degree Rape or the crime of attempted First Degree Kidnapping or attempted Second Degree Kidnapping?

ANSWER: _____
(write in "yes" or "no")

(e) Did the defendant, BRIAN KEITH LORD, commit the murder in the course of, or in immediate flight from the crime of Rape in the First Degree or Rape in the Second Degree or Kidnapping in the First Degree?

ANSWER: Yes
(write in "yes" or "no")

Dated this 18 day of July, 1987.

/s/Gervais Crawford
FOREMAN

(Italics ours.)

Each of the alternatives set out in both instruction 13 and Special Verdict Form A-1 allowed the jury to find that either rape or kidnapping was the underlying crime. Because neither required the jury to unanimously agree as to which underlying crime -- rape, or kidnapping, or both -- was committed, the instruction was incomplete. However, the omission was cured by a preceding instruction and its related verdict form.

Instruction 12 provided:

> NO. 12
>
> To convict the defendant of the crime of Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (Alternative A) Premeditated Murder in the First Degree
>
> (1) That on or about the 16th day of September, 1986, the defendant caused the death of Tracy Parker;
>
> (2) That the defendant acted with intent to cause the death of Tracy Parker;
>
> (3) That the intent to cause the death was premeditated;
>
> (4) That Tracy Parker died as a result of defendant's acts; and
>
> (5) That the acts occurred in Kitsap County, Washington;
>
> OR
>
> (Alternative B) Felony Murder in the First Degree
>
> (1) That on or about the 16th day of September, 1986, Tracy Parker was killed;

(2) That the defendant was committing or attempting to commit Rape in the First Degree or Rape in the Second Degree;

(3) That the defendant caused the death of Tracy Parker in the course of and in furtherance of such crime or in immediate flight from such crime;

(4) That Tracy Parker was not a participant in the crime;

and

(5) That the acts which caused the death of the decedent occurred in Kitsap County, Washington;

OR

(Alternative C) Felony Murder in the First Degree

(1) That on or about the 16th day of September, 1986, Tracy Parker was killed;

(2) That the defendant was committing or attempting to commit Kidnapping in the First Degree or Kidnapping in the Second Degree;

(3) That the defendant caused the death of Tracy Parker in the course of and in furtherance of such crime or in the immediate flight from such crime;

(4) That Tracy Parker was not a participant in the crime;

and

(5) That the acts which caused the death of the decedent occurred in Kitsap County, Washington.

If you find from the evidence that each of the elements in Alternative A or each of the elements in Alternative B, or each of the elements in Alternative C, has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. All of the elements of only one alternative need be proved. You must unanimously agree as to which one or more of the alternatives, A, B, or C, has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the elements in Alternative A, and as to any one of the elements in Alternative B, and as to any of the elements in Alternative C, then it will be your duty to return a verdict of not guilty.

(Italics ours.)

Verdict Form A provided:

VERDICT FORM A

We, the jury, find the defendant, BRIAN KEITH LORD, Guilty of the crime
(Guilty or Not Guilty)
of Murder in the First Degree, as charged.

The jurors found:

Alternative A, Premeditated First Degree Murder Yes
Write in "yes" or "no"

Alternative B, Felony First Degree Murder Yes
Write in "yes" or "no"

Alternative C, Felony First Degree Murder Yes
Write in "yes" or "no"

/s/ Gervais Crawford
FOREMAN

If, and only if, the Jury found the defendant guilty of Alternative A then answer the questions on Special Verdict Form A-1.

Instruction 12 and Verdict Form A required the jury to consider Alternative B (rape) and Alternative C (kidnapping) separately, and to determine if all of the elements of each crime were proven. As is clearly demonstrated by the affirmative responses to Alternatives B and C on Verdict Form A, the jury unanimously agreed that Lord was guilty of rape and of kidnapping. Thus, any error resulting from instruction 13 was cured by instruction 12 and Verdict Form A.

Lord next contends that several of the jury instructions during both the guilt and penalty phase of the trial were too

complex for the jury to understand. This contention is based on the use of a computer program that ostensibly analyzes written information for comprehensibility. No objection was made on this basis at trial, nor was the computer program and related analysis offered for admission at trial. Thus, not only was the issue omitted below, but also it is based on evidence not contained in the record.

We decline to reach this issue because it is not based on a "manifest error affecting a constitutional right". RAP 2.5(a)(3). First, not all instructional errors are of constitutional magnitude. Neither the failure to instruct on lesser included offenses, the failure to define individual terms in instructions, nor the failure to define technical terms in instructions are errors of constitutional magnitude. State v. Scott, 110 Wn.2d 682, 688 n. 5, 689, 757 P.2d 492 (1988). Second, "[t]he requirements of due process usually are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted." Scott, at 690.

While we do not question that jury instructions in any death penalty case are complicated and lengthy, it is out of an

abundance of caution for the defendant's rights that we are so precise. The argument discussed above regarding jury unanimity is graphic evidence of the need for detailed instructions. Precision necessarily entails complexity. We cannot fault trial judges for failing to carefully instruct a jury, and then find error because the instructions are too complicated. The complex nature of the jury instructions is not, in and of itself, an instructional error of constitutional magnitude warranting review for the first time on appeal.[13]

Sufficiency of the Evidence

Lord contends that the evidence was insufficient to convict him of aggravated first degree murder. He first argues that the evidence is insufficient to prove that he was the

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[13] While we do not reach this issue, we note that the instructions given in the penalty phase, with the exception of minor word changes and a change in Instruction 5 made at Lord's request, parallel the instructions upheld against a number of challenges in State v. Mak, 105 Wn.2d 692, 750-53, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), sentence vacated on petition for writ of habeas corpus, 754 F. Supp. 1490 (W.D. Wash. 1991). Indeed, when asked by the court if he had any exceptions to the instructions, Lord indicated that they were the appropriate instructions in light of Mak.

Because we decline to review this claim, Lord's motion to supplement the record with the computer program and related analysis is denied.

perpetrator, and second, that the evidence is insufficient to support the underlying crimes of rape and kidnapping.

When a sufficiency challenge is raised, the question to be considered is if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Jeffries, 105 Wn.2d 398, 407, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986); State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Because the underlying facts were set forth in considerable detail at the beginning of this opinion, we need not repeat them here.

Lord first argues that the evidence is insufficient to prove that he was the perpetrator because it would have been difficult, if not impossible, for him to talk Tracy into a ride, rape her, murder her and dispose of the body and the clothes within the theorized time frame. We disagree.

Because Tracy previously had asked Lord for rides when she was late getting home, the evidence does not support Lord's contention that he needed time to persuade her to ride with him. Similarly, the evidence does not require the inference that Lord

had to dispose of both the clothes and the body during the same time frame. Don Carroll was never asked if he saw the clothes. Neither the Carrolls nor Kirk entered the workshop that evening. Indeed, Lord asked Don Carroll not to go into the workshop. The evidence does not lead to the inference that the clothes were not in the car, the workshop or elsewhere in the general vicinity.

Furthermore, the timing and travel measurements were approximations, not rigid determinations. The driving time calculations were based on someone driving at the posted speed limit. At 8 p.m., Tracy was already late getting home. Lord was late to a dinner party at his own apartment. And, most significantly, Don Carroll testified that Lord arrived at the workshop driving "[p]retty fast", despite the fact that the truck was smoking and steaming because of a defective gasket. The evidence supports the inference that Lord was driving faster than the posted limits that evening. In viewing all inferences most favorable to the State, the record shows that it was possible for Lord to accomplish the crime within the time limits suggested by the evidence.

Lord also argues that there is insufficient evidence to support his conviction for first degree murder because, in his

words, there is unexplained evidence that is incompatible with his guilt. To the extent that this argument is based upon evidence not in the record, and never offered for inclusion in the record, it is without merit. As to evidence in the record which Lord contends raises questions about his guilt, we conclude that the inferences he draws are not compelling in light of the totality of the record.

Our review of the entire record establishes that, when viewed in the light most favorable to the State, the record reflects sufficient evidence to convict Lord of first degree murder.

Lord also challenges the sufficiency of the evidence supporting the aggravating factors of rape and kidnapping. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that Tracy had been rendered unconscious, or at least unable to resist, and then been raped. The evidence was sufficient to establish rape as an aggravating factor supporting Lord's aggravated first degree murder conviction. Accordingly, we need not inquire further as to if the evidence was also sufficient to establish kidnapping.

Ineffective Assistance of Counsel

Lord contends that he was denied effective assistance of counsel. The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) and adopted by this court in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). There is a strong presumption that counsel have

rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case as of the time of counsel's conduct. Strickland, at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 694. Because Lord must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. Strickland, at 697.

Lord contends that he received ineffective assistance of counsel because his trial attorneys did not adequately investigate and prepare the case, and because they made various trial decisions and arguments that did not meet a minimum degree of competence. However, assuming, arguendo, that trial counsel's

performance was deficient, Lord has failed to meet his burden of establishing prejudice.

First, Lord argues that trial counsel failed to pursue easily obtainable evidence concerning the number of matchbooks available in Kitsap County similar to the two admitted as evidence.[14] It can be assumed that the jury was aware that matchbooks are a common item and that there was a likelihood that other similar matchbooks existed. The number of matchbooks distributed in the area does not diminish the probative value of the matchbooks admitted into evidence. Moreover, the matchbook evidence was only a minute piece of the picture relied upon to establish a connection between Lord and the pile of clothing found near Island Lake.

Second, Lord alleges prejudice from his trial counsel's failure to call witnesses who claimed to have seen the victim the day after she was killed.[15] However, the State produced evidence that the victim's sister, whose appearance was very

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[14] On appeal, Lord moved to supplement the record with evidence of the number of similar matchbooks distributed in Kitsap County and surrounding areas. This motion is denied.

[15] Lord's entire argument consists of the following: "Second, the defense did not produce the testimony of witnesses who saw Tracy alive the next day." Brief of Appellant, at 145.

similar to Tracy's, had been out searching for her sister and could have been mistaken for her. Moreover, there was also testimony that Tracy was not in school on September 17. Lord has not established that there is a reasonable probability that the testimony of these witnesses would have affected the outcome of the trial.

Third, Lord claims that trial counsel did not present demonstrative evidence illustrating the shortcomings of the State's case. He argues that a chart showing deficiencies in the State's case would have diffused its strength. However, trial counsel vigorously cross-examined the State's expert witnesses concerning the contents of the summary charts and the limitations of the testing of trace evidence. A number of corrections were made to the charts as a result of defense objections. Trial counsel brought out perceived deficiencies and inconsistencies in the State's case during closing argument. A chart of unconnected trace evidence would have been of questionable value. Lord also argues that counsel should have made a time line chart to establish that he did not have time to commit the crimes charged. However, trial counsel did refer to

the time line produced and used by the State during closing argument.

Fourth, Lord argues that trial counsel should have discovered Phillips' falsehoods sooner. As already noted, trial counsel never relied on the false report, and when it became known, counsel had access to voluminous impeachment evidence against Phillips. He was cross-examined vigorously about this issue.

As to Lord's remaining claims, he himself acknowledges that they can be categorized as "tactical judgments". Brief of Appellant, at 146. Essentially, Lord argues that no competent counsel would delay opening statement until after the victim's mother testified. Further, he alleges that the closing argument was without "real content, organization or persuasive ability." Brief of Appellant, at 146. Neither the opening statement nor closing argument are evidence to be considered by the jury. Moreover, a review of the record leads us to the conclusion that the opening statement and closing argument fall within the purview of tactical judgments and are not to be second-guessed by this court.

In sum, Lord has failed to meet his burden of showing that he was prejudiced by the alleged ineffective assistance of trial counsel.

Ex Parte Conduct

Lord next contends that his conviction must be reversed because his right to a fair trial was denied by prosecutorial conduct. He claims that the prosecuting attorney, C. Danny Clem, engaged in improper ex parte contact in violation of RPC 4.2 by exchanging vulgarities with him during trial.[16] Lord submitted an affidavit to the trial court alleging that the prosecutor called him derogatory names and made disparaging comments about him. Lord corroborates these stories with a newspaper account of Clem's statements to the Rotary Club after the trial.[17]

Although Lord did not report the alleged incidents to his counsel during trial, he contends that it is "likely that the jury observed" the exchanges. There is nothing in the record which supports his contention. Both of the prosecutors submitted

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[16] RPC 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

[17] The newspaper article is not in the clerk's papers.

affidavits stating that there were no exchanges between Clem and Lord "in the presence of the jury". Neither of Lord's trial attorneys submitted affidavits in support of this motion.

Lord brought a posttrial motion requesting a new trial and a fact-finding hearing to determine if the jury had observed any contact between Lord and the prosecutor. The trial court found that a hearing was unnecessary and denied the motion because, even presuming that Lord's allegations were true, the alleged misconduct would not rise to the level of requiring a new trial.[18] In reaching this conclusion, the court considered:

> that there were two and-a-half months of trial, that there was overwhelming evidence supporting the conviction of the defendant, [and] that there was more than adequate evidence presented in the penalty phase for the jury to have arrived at the decision to apply the death penalty . . .

Lord relies on the Rules of Professional Conduct (RPC) to support his allegation of prosecutorial misconduct which, he argues, requires reversal. However, the remedy for a claimed violation of the RPC is a request for discipline by the bar association. In the context of a criminal trial, Lord's allegation

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[18] While Lord assigns error to the trial court's denial of his motion for a fact-finding hearing, he offers no argument in support of this assignment of error.

of prosecutorial misconduct is reviewed under applicable case law.

The granting of a new trial based on allegations of prosecutorial misconduct is within the sound discretion of the trial court. State v. Carr, 13 Wn. App. 704, 709, 537 P.2d 844 (1975). A new trial should be granted only if the defendant's right to a fair trial was prejudiced. The trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial. Carr, at 709. Furthermore, Lord's conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. State v. Wood, 44 Wn. App. 139, 145, 721 P.2d 541, review denied, 107 Wn.2d 1011 (1986).

Based on the record before us, we conclude that the trial court did not abuse its discretion in denying Lord's motion. Additionally, we cannot conclude that there is a substantial likelihood that the jury observed the alleged exchanges, much less that it affected the verdict. Accordingly, Lord's claim of prosecutorial misconduct does not require reversal. Having found no reversible error during the guilt phase, we turn now to the penalty phase of Lord's trial.

## PENALTY PHASE

Whenever the State requests the death penalty, a special sentencing proceeding is held. RCW 10.95.050. After hearing evidence and argument, the jury deliberates and returns an answer to the following question:

> "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

RCW 10.95.060(4). The jury is then instructed that an affirmative answer must be unanimous. If the question is answered in the affirmative, the defendant is sentenced to death. RCW 10.95.080. The jury in the present case found that there were not sufficient mitigating circumstances to merit leniency.

### Heightened Scrutiny

Lord raises a number of issues based on alleged constitutional and procedural errors in the penalty phase of his trial. Because the death penalty qualitatively differs from all other punishments, there must be reliability in the determination that death is the appropriate punishment. Johnson v. Mississippi, 486 U.S. 578, 584, 100 L. Ed. 2d 575, 108 S. Ct. 1981 (1988); State v. Bartholomew, 101 Wn.2d 631, 638, 683

P.2d 1079 (1984) (citing Gardner v. Florida, 430 U.S. 349, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977)). Thus, capital sentencing determinations are subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases.[19] Caldwell v. Mississippi, 472 U.S. 320, 329, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985).

However, heightened scrutiny means just that: a closer, more careful review of the record. Heightened scrutiny does not raise the standard of review. For example, in reviewing a challenge to an evidentiary ruling by the trial court, we still employ the abuse of discretion standard in the penalty phase. We will, however, more carefully review the factual basis upon which the trial court relied to ensure that the ruling complies with that standard.

Scope of Cross Examination

Lord claims that, during the cross examination of his father, Leslie Lord, the State improperly elicited evidence of crimes with which Lord had not been charged in violation of State v. Bartholomew, 98 Wn.2d 173, 654 P.2d 1170 (1982)

[19] The dissent implies that heightened scrutiny is to be utilized in review of the guilt phase as well as the sentencing phase. Dissent, at 10. We disagree. Heightened scrutiny applies only to the penalty phase.

(Bartholomew I), State's cert. granted and remanded, 463 U.S. 1203, defendant's cert. denied, 463 U.S. 1212 (1983), reaff'd on remand, 101 Wn.2d 631, 683 P.2d 1079 (1984) (Bartholomew II).[20] He contends that the admission of this evidence denied him his due process right to a fair trial.

Lord argues that Bartholomew "unequivocally prohibits the use of evidence relating to uncharged crimes." Reply Brief of Appellant, at 33. He mischaracterizes the holding of that case. Bartholomew I and II held that, because of its unreliability, evidence of uncharged crimes is not permitted in the State's case in chief. Bartholomew II, at 641 (quoting Bartholomew I, at 196-97. There, the evidence of uncharged crimes was presented through the State's witnesses. Bartholomew I, at 179. In fact, Lord does not dispute that the State properly introduced evidence of his prior convictions in its

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[20] Bartholomew I held that the admission of uncharged crimes violated the Eighth Amendment. Bartholomew I, 98 Wn.2d at 199. The United States Supreme Court granted certiorari, and then vacated and remanded Bartholomew for reconsideration in light of Zant v. Stephens, 462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). This court reaffirmed the original holding in its entirety based on both federal and independent state grounds under article 1, sections 3 (due process) and 14 (cruel punishment) of the Washington State Constitution. Bartholomew II, at 644.

case in the sentencing phase. Two exhibits were submitted to the jury as evidence of Lord's conviction for unlawful imprisonment and his conviction for second degree murder. No other evidence was presented by the State.

Essentially, Lord is attempting to extend the rule announced in Bartholomew to the cross examination and rebuttal stages of the penalty phase. There is no authority for this extension, and we decline to create any. To the contrary, Bartholomew II specifically noted the admissibility of rebuttal evidence:

> In our opinion, the prosecution should be entitled to produce information necessary to rebut mitigating evidence produced by defendant.

Bartholomew II, at 642 (quoting Bartholomew I, at 197). The general rule, then, provides as follows:

> Specifically, evidence of nonstatutory aggravating factors must be limited to defendant's criminal record, evidence that would have been admissible at the guilt phase, and evidence to rebut matters raised in mitigation by the defendant.

(Italics ours.) Bartholomew II, at 642.

Thus, when the defendant presents evidence of mitigating circumstances, the prosecution is not restricted to the record of convictions. The State is entitled to cross-examine defense witnesses and introduce relevant evidence to rebut

defendant's evidence so that the jury receives a balanced and complete picture. Lord's argument that the State should not be allowed to test the allegations of defense mitigation witnesses was specifically rejected in Bartholomew I:

> Unless the prosecution is permitted to test the reliability of defendant's evidence or attempt to rebut it, the jury may well approach the crucial sentencing decision from a distorted perspective. Such distortion could lead to arbitrary sentencing of the kind struck down in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972). For these reasons, we hold that the prosecution should be entitled to produce evidence to rebut mitigating evidence produced by defendant.

Bartholomew I, at 197-98. As is the case in most evidentiary questions, the reliability of the evidence is crucial. In Bartholomew, we emphasized that objective, reliable evidence was admissible because of its value to the jury. Bartholomew I, at 196. As the reliability of the questioned evidence is enhanced, the prejudice--as that term is used here--is diminished.

Under Bartholomew II, the trial court must, therefore, employ a balancing test to determine the proper scope of cross examination or the admissibility of rebuttal evidence:

> The court must balance the extent to which the evidence tends to rebut defendant's mitigating information against the extent to which the evidence is otherwise prejudicial to defendant.

> Only if the rebuttal value of the evidence outweighs the prejudicial effect should the evidence be admitted.

Bartholomew II, at 643 (quoting Bartholomew I, at 198). The Bartholomew test essentially restates ER 403, which provides, in part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." In this context, we are concerned with the probativeness of the testimony on cross examination: its "rebuttal value". Although this test was set forth in dicta in Bartholomew I and II, we are convinced that it may be a useful rephrasing of ER 403, and we hereby adopt its language.

This rule is analogous to the rules of evidence concerning testimony about defendant's character. Character evidence may be refuted on cross examination of defense witnesses under ER 405(a):

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

When a defendant presents evidence of his character, the State may inquire further to determine the reliability of that evidence. A defendant's character witness may be cross-examined about his personal knowledge of specific incidents of misconduct.

State v. Styles, 93 Wn.2d 173, 175, 606 P.2d 1233 (1980) (quoting State v. Donaldson, 76 Wn.2d 513, 518, 458 P.2d 21 (1969)); 5 K. Tegland, Wash.Prac., Evidence § 125, at 451 (3d ed. 1989). The broad scope of this rule is explained by one commentator as follows:

> The scope of cross-examination is sufficiently broad to make it dangerous for the defendant to call character witnesses unless the defendant has led a good life. A character witness may not only be asked whether he "has heard" this or that about the defendant, but he may also be asked "Do you know" this or that about the defendant.

(Footnote omitted.) 5 K. Tegland, at 450. In Styles, we reaffirmed the continuing vitality of this rule.[21]

In sum, defense witnesses may be cross-examined concerning anything relevant to a matter raised in mitigation by the defendant, subject to the balancing test. Bartholomew II, at 642-43 (citing Bartholomew I, 98 Wn.2d at 197-98). The use of

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[21] The primary purpose of cross examination must be to impeach the defense witness, not to vilify the defendant's character. Styles, at 176. Because this distinction may be a fine one, it is best left to the trial court to evaluate the prosecution's motives during cross examination. The trial court must determine the good faith of the State, and if the questioning was allowed, we review only for an abuse of discretion. Absent a manifest abuse of discretion, the ruling of the trial court will not be disturbed. Styles, at 176-77.

the rules of evidence in this context serves to enhance the truth-finding process which is the touchstone of criminal law.

We now apply these principles to the specific evidentiary matters to which Lord assigns error.[22] In mitigation, the defense called a number of witnesses, including Lord's family members, friends, and a psychologist. Lord's father, Leslie, testified about Lord's childhood activities, the family relationship, and Lord's skill as a carpenter. In addition, the defense brought forth testimony about the circumstances surrounding Lord's prior convictions. Leslie was questioned about Lord's attitudes and actions at the time of both crimes. The following exchange took place:

> Q. Could you describe for this jury what type of child Keith was [at the time of the second degree murder]?
> A. He was a good boy, a loving kid and just a real good kid. I was proud of him to have him for my son. He was a great -- I mean he just loved all the family like we love him. We're a real close family.

Defense counsel concluded by asking:

> Q. Les, do you know what Keith has been convicted of?
> A. Yes, I do.
> Q. You know what his past is, don't you?
> A. Yes.
> Q. How do you feel about him now?
> A. I love him dearly. I love him. He's a good boy.

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[22] We note that Lord mischaracterizes the evidence he challenges as "uncharged crimes". The disputed evidence relates only to certain circumstances of the crimes which were properly before the jury.

During the State's cross examination, Leslie admitted that Lord had violated conditions of his probation from the second degree murder conviction by dropping out of school and committing two traffic offenses. He also acknowledged that the victim of the unlawful imprisonment was Lord's sister-in-law at the time of the offense. He testified that he did not know how old she was. When asked if she was 14, he replied: "Somewhere in that age. I don't know her age." The defense made no objections during this testimony.

Leslie also admitted that the victim had been in the hospital because of injuries inflicted by Lord and that Lord fled from police before being arrested. The prosecutor concluded by asking Leslie if he thought Lord was still a good boy after being convicted of murder and violating the conditions of his probation. Leslie reiterated that he did think Lord was a good boy.

Lord claims that the trial court improperly allowed testimony that the victim was assaulted in the course of the unlawful imprisonment. There was no such evidence. The defense objection made when the question was asked was sustained. Leslie's only testimony, over a defense objection, was

that the victim was injured by Lord. However, this cannot be characterized as evidence of an uncharged crime, nor as unfairly prejudicial. In the State's case in chief, the jury was told that Lord's conviction for unlawful imprisonment was "effected by violence, menace, fraud, and deceit". State's exhibit 2. The infliction of injuries is inherent in a crime committed by violence.

Lord next claims that the trial court improperly allowed testimony that he had fled from police and violated his probation. To determine if this questioning was proper, we apply the balancing test. Lord chose to present testimony in mitigation about circumstances surrounding the prior murder and unlawful imprisonment. Furthermore, Leslie testified twice on direct that Lord was a "good boy". He referred to his opinion of Lord both at the time of the second degree murder and now. The testimony that Lord had failed to follow the terms of his probation and had eluded police expanded on the testimony presented and directly rebutted the evidence of good character offered by Lord's father. The recounting of specific incidents to impeach defendant's witness is appropriate. In this setting, it was particularly so, since it indicated that Leslie's opinion of

Lord was unchanged by the knowledge of his criminal behavior. Unless the prosecution is permitted to rebut defendant's evidence, the jury may well approach the crucial sentencing decision with an incomplete picture. Bartholomew I, at 197.

Moreover, any prejudice resulting from testimony that Lord dropped out of school and had two traffic violations, or even that he fled police, is insignificant given that the jury was properly aware of both of Lord's prior convictions for violent crimes. Indeed, the single most potentially prejudicial aspect of the evidence in the penalty phase was the second degree murder of a family friend. In sum, the prejudicial effect of the challenged testimony was minimal, and was clearly outweighed by the probative value of the rebuttal evidence. The testimony concerning Lord's probation violations and flight from the police was necessary to give the jury a complete picture of Lord. It was properly admitted under Bartholomew.

Finally, Lord argues that the age of the victim in the unlawful imprisonment case was improperly elicited.[23] No

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[23] To clarify the record, there was no testimony that the victim was 14. Leslie's only testimony as to her age was that she was a teenager and somewhere around 14. When Lord's older sister was asked on cross examination if she knew how old the victim was at the time of the unlawful imprisonment, she said she did not know. She did, however, respond

objection was made during cross examination regarding this testimony. A claim of manifest error affecting a constitutional right may, however, be raised for the first time on appeal. State v. Hieb, 107 Wn.2d 97, 108, 727 P.2d 239 (1986); RAP 2.5(a)(3). Lord asserts that the admission of the victim's age was so prejudicial as to be violative of his due process right to a fair trial. We disagree.

Lord's argument focuses on one relatively insignificant fact -- the age of the victim -- as being prejudicial and ignores the impact of other aspects of the imprisonment which he cannot properly contest. Lord's prior conviction involved a violent attack of a woman whom he held by use of violence, menace, fraud, and deceit. When viewed in the context of the entire crime, we do not believe that her status as a teenager was unfairly prejudicial to the defendant.

Additionally, though Lord makes a generic due process claim, he does not specify how the age of the victim especially prejudiced him and, thus, was constitutional error. In the

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affirmatively when asked if the victim was a teenager at that time. The jury was instructed to rely only on the testimony and evidence as given by the witnesses, and we presume that it followed all instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983).

absence of prejudice, Lord has failed to show that the claimed error was of constitutional magnitude, and so we need not review. See State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

It is important to keep in mind the context in which these allegations of prejudice are made. In addition to the violent and premeditated murder which the jury re-lived during the guilt phase, the jury learned of Lord's 1975 conviction for second degree murder of a female family friend, and the brutal circumstances of that crime -- the victim was shot with two guns by Lord and was calling for help when she was mortally wounded. The jury also knew of his 1980 conviction for unlawful imprisonment "by violence, menace, fraud, and deceit" of another female victim. Lord showed no remorse for his crimes, nor did he offer any explanation of extenuating circumstances.

In conclusion, given the totality of the circumstances presented to the jury, we are convinced that no improper evidence was admitted. As noted above, Lord himself chose to put forth evidence related to his prior crimes. The challenged testimony was entirely reliable and presents none of the

problems we examined in Bartholomew. We will not disturb the jury's unanimous decision that there were insufficient mitigating circumstances to merit leniency.

Admission of Juvenile Conviction

Lord contends that he was denied due process and equal protection by the admission of his California juvenile conviction for second degree murder. To the extent that we can distill specific arguments from what is essentially a philosophical discussion, Lord appears to be making two arguments. First, allowing the sentencing jury to consider a juvenile conviction violates Const. art. 1, § 21[24] and the Sixth Amendment[25] because juveniles do not have the right to a jury trial. Second, the underlying conviction may be defective if the California court did not require that each of its elements be proved beyond a reasonable doubt.

Lord cites no authority for his first claim. Juveniles do not have a constitutional right to a jury trial under either article 1, section 21 or the Sixth Amendment. State v. Schaaf, 109

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[24] Article 1, section 21 provides, in part: "The right of trial by jury shall remain inviolate . . ."

[25] The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Wn.2d 1, 16, 743 P.2d 240 (1987); State v. Lawley, 91 Wn.2d 654, 658-59, 591 P.2d 772 (1979) (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971)). Nor does due process require that juveniles have the right to a jury trial. Lawley, at 659.

As to his second argument, Lord contends that equal protection concerns arise if he was convicted under a lesser standard of proof than other defendants. However, the trial court specifically addressed this issue and, after reviewing the relevant documents and applicable law, concluded that the standard of proof utilized by the California court was guilt beyond a reasonable doubt. Lord does not challenge this conclusion. He cannot support an equal protection challenge on this basis.

The sentencing jury may consider "[w]hether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity", RCW 10.95.070(1), in determining if there are not sufficient mitigating circumstances to merit leniency.

Lord's constitutional claims are without merit. His juvenile conviction was properly admitted pursuant to RCW 10.95.070(1).

## Allocution

After the defense concluded its case, Lord chose to make an unsworn statement to the jury. He claims that he was denied due process by the trial court's decision to allow the prosecutor to cross-examine him following this statement. He contends that, because he was exercising his right to allocution, he was not subject to cross examination. The State does not dispute that Lord had a right to allocution. Rather, the State argues that cross examination was proper because Lord, in fact, gave testimony in the guise of allocution.

Allocution is a plea for mercy; it is not intended to advance or dispute facts. Historically, allocution was allowed:

> to show why judgment should not be pronounced against [a defendant] on verdict of conviction; or, whether he would like to make a statement on his behalf and present any information in mitigation of sentence . . .

Black's Law Dictionary 76 (6th ed. 1990). In contrast, testimony is offered to dispute a fact at issue or present evidence of another fact which the accused offers defensively. State v. Mak, 105 Wn.2d 692, 729, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), sentence vacated on petition for writ of habeas corpus, 754 F. Supp. 1490 (W.D. Wash. 1991).

In Mak, we explained that allocution is not a vehicle which allows a defendant to testify as to his version of the facts while avoiding cross examination.

> [I]t appears that what the defendant was apparently seeking was the right, at the end of the penalty phase of the trial, to present evidence on the issue before the jury which would be uncross-examined, unsworn, unrebuttable and unanswerable by argument. Nothing in the statute contemplates or permits that, nor does our former allocution rule. The defendant was given his right to speak to the jury at the sentencing hearing without being required to take an oath, and was again given the right to speak to the trial court before sentence was actually imposed. There was no denial of the defendant's right to allocution.

(Footnotes omitted. Italics ours.) Mak, at 729.

The trial court here relied on Mak and ruled that, to the extent that Lord was engaged in allocution, he would not be subject to cross examination. However, if his statement presented evidence, the State could cross-examine. The court explained this ruling to the parties:

> The common sense limitation which says that he may ask for mercy based on a plea of some sort to the jury is also, I think, the common-law principal of the right of allocution. I don't think the common-law right of allocution or the historic right of allocution is predicated on the presentation of evidence, and once the defendant begins to present evidence in our historic sense, then I think he is subject to

> cross-examination. If he tells this jury, "I did not do it," then statements which may be admissible in rebuttal if they're admissible for other reasons, and will be the subject of cross-examination.
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> . . .
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> . . . He may not produce evidence in the sense we traditionally use evidence, that is he cannot deny the offense and not be confronted with potential evidence where he admits the offense and/or present factual issues on which he can be cross-examined. He may ask that jury for mercy. He may make statements about his own good person. And so I'm not denying him right to make a request for mercy, but he cannot testify and not be subject to cross-examination and rebuttal.

The court also made a special effort to ensure that Lord was aware of the parameters of his right of allocution. Lord was expressly warned that if he testified as to facts at issue, he would be subject to cross examination:

> MS. MANDEL: As a final matter, we have concluded our witnesses. . . . Mr. Lord has indicated his wish to allocute and we have advised him against doing that.
>
> THE COURT: Mr. Lord, are you going to speak to the jurors?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You understand that I have previously ruled that certain kinds of statements may make you subject to cross-examination?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you understand that other kinds of statements may not make you subject to cross-examination?
>
> THE DEFENDANT: Yes.

The court then stated:

> When Mr. Lord has finished speaking, I will probably take a recess and ascertain from the prosecutor whether they wish to cross-examine so I can make the decision about relevancy and/or get Mr. Lord seated in the witness stand for that to occur.

During his statement to the jury, Lord said that he had never asked anyone to lie for him. He denied making the statements to which the jail trusties testified. He said that law enforcement officers had "changed around" statements he made to them. He then stated:

> Then there was, since I didn't get to testify, my lawyers thought that was the wrong thing for me to do, which I wanted to but I was told not to, and I just would have liked to have been able to testify to be able to say my part of the story, you know. Because after I left the Fryes' house, September 16th, I went to my brother's, straight to my brother's, and from there I never left my brother's property, never.

He went on to relate his problems with drugs and alcohol and his prior criminal history, including facts about the unlawful imprisonment conviction. He concluded by stating that the County, the police and the prosecutor had lied during trial.

When Lord finished, the court excused the jury. After hearing argument from both sides, the court ruled that the prosecutor would be permitted to cross-examine Lord regarding

his statement that he had not asked any witness to lie for him, his statement regarding leaving the Fryes', and his prior criminal record. Lord does not contend that the prosecutor exceeded the scope of this ruling. Rather, Lord argues that it was error to allow cross examination at all. We disagree.

Lord's discourse to the jury was not a plea for mercy. Instead, he used his unsworn statement as an opportunity to dispute evidence presented by the State and to offer his own version of the events the night of the crime. In other words, he offered testimony.

Had Lord limited his statement to the jury to allocution, it would not have been subject to cross examination. However, he did not. Lord was warned that certain types of statements would be subject to cross examination, and he indicated that he understood. Nonetheless, he proceeded to give evidence on a number of relevant and disputed issues. This opened the comments to cross examination, as the trial court correctly ruled.

Denial of Competency Hearing

At the beginning of the penalty phase of Lord's trial, defense counsel moved for a hearing to determine if Lord was competent to proceed. The motion was based on statements Lord had made to jail staff, Lord's request that Mr. Ness withdraw as defense counsel, and Lord's insistence that defense counsel not call his familiy to testify on his behalf. The motion was not made at Lord's request. To the contrary, he told the court that he was competent and that a hearing was not necessary. The trial court ultimately denied the motion, based on its ruling that the threshold burden of establishing that such a hearing was required had not been met. On appeal, Lord argues that he was denied due process of law by the trial court's refusal to conduct a hearing.

A defendant is competent if he has the capacity to understand the nature of the proceedings against him and to assist in his own defense. State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); RCW 10.77.010(6). An incompetent person cannot be tried, convicted, or sentenced for the commission of an offense while his incapacity continues. Wicklund, at 800; RCW 10.77.050. A defendant need not be

able to choose among alternative trial strategies to be competent. State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144 (1986). Thus, a disagreement between the defendant and counsel as to the manner in which to proceed, without more, does not raise the issue of competency.

A competency hearing is required "[w]henever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency". (Italics ours.) RCW 10.77.060(1). Thus, unless an insanity defense is raised, a hearing is required only if the court makes a threshold determination that there is reason to doubt the defendant's competency. If the court determines that there is reason to doubt the defendant's fitness, the court must hold a competency hearing in accordance with statutory procedures. Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985).

These determinations are within the trial court's discretion.

> A motion to determine competency does not have to be granted merely because it has been filed, United States v. McEachern, 465 F.2d 833, 837 (5th Cir.), cert. denied, 409 U.S. 1043 (1972), and is not of itself sufficient to raise a doubt concerning competency.

Gordon, at 441. Thus, the motion must be supported by a factual basis. Only then will the court inquire to verify the facts. Gordon, at 441-42. In reviewing the motion, considerable weight should be given to the attorney's opinion regarding his client's competency and ability to assist the defense. Gordon, at 442.

In support of the present motion, defense counsel offered the testimony of Jamie Miller, the corrections officer who transported Lord from the jail to court. Miller said that earlier that day, Lord told him "he had a conversation with the Lord and the devil and the devil asked him to drink a cup of his own blood to prove his innocence". Also, Lord had asked Miller to handcuff him when he appeared in court because Lord was afraid of what he would do to attorney Ness. In response to questions by the prosecutor, Miller stated that Lord was ranting and raving when he made the statement about the devil and, from his experience working in the jail, people in Lord's situation try to raise questions about their competency. Defense counsel then stated that Lord did not want Ness to continue as his attorney. In response to questions from the court, Lord stated that, while he did not want Ness to continue as his

attorney, he was not asking attorney Mandel to withdraw. Furthermore, he said he believed he was competent to assist either Ness or Mandel in his defense.

The court then denied Lord's request to remove Ness as counsel and ruled that a staff member from Western State Hospital would be allowed to interview Lord. The State did not object. The court also gave the defense an opportunity to have its own expert examine Lord. The prosecutor made arrangements for a psychiatrist and a psychologist to examine Lord the following morning, and the court authorized defense counsel to be present.

The following morning, Lord's attorney informed the court that, because they had not been able to make arrangements for their own expert to examine Lord, they would not allow the scheduled examination to proceed. The court then stated:

> So far the defendant has not established sufficient record by testimony, affidavit, medical report or their own statements to trigger a competency hearing. The appointment of the Western State experts yesterday was an attempt to be, in my opinion, extremely fair to Mr. Lord, to allow, at least before the Court even made a threshold decision about whether to hold a competency hearing, some medical evidence with which to proceed.

The court concluded that the defense's claim that Lord and his attorneys did not agree on how to proceed during the sentencing phase was not sufficient grounds for the court to find that competency was at issue. Specifically, the court noted that defense counsel had not made any assertion that Lord was unable to recall or relate facts sufficient for defense counsel to proceed in the sentencing phase.

The court next offered defense counsel an opportunity to supplement the record in support of the motion. Defense counsel stated that Lord was entitled to a hearing based on his statements to the jailer, his anger at Ness, which his counsel characterized as irrational, and his requests that Ness withdraw as counsel and that his family not testify during the penalty phase. The court responded:

> I understand there was testimony yesterday from the jail staff. I listened to that testimony. I assume that testimony is accurate. I have observed Mr. Lord for 10 weeks. I observed Mr. Lord yesterday in court. I listened to him respond to the questions from the Court. I've watched him consult with his attorney, at this point there is not sufficient prima facie indicia for the Court to grant a full blown competency hearing.
>
> . . . What I'm asking counsel now is if they wish to supplement the record in any way at this point, and in their request to have a competency hearing. And I have not heard from

> counsel that the disagreement that they have with Mr. Lord goes to other than the strategy as to how to proceed in the sentencing phase.

Defense counsel then requested an in camera hearing to present further information in support of the motion. The court asked if they wanted the court to have an evaluation done by the experts from Western State as medical evidence to be considered in making the threshold determination of incompetency. Defense counsel again declined the offer of an evaluation and chose to proceed with an in camera hearing to supplement the information available to the court. The hearing was held, the proceedings of which were transcribed and filed under separate cover. After the hearing, the court ruled that defense counsel had failed to make the required threshold showing that a competency hearing was needed and, therefore, denied the motion.[26]

Upon a review of the record, including the transcript of the in camera hearing, we conclude that the trial court did not abuse its discretion in determining that defense counsel failed to

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[26] The court also ruled that Lord, "although competent to stand trial and to participate in the sentencing phase, is not competent to make trial strategy decisions . . . and it is not in his best interests for him to control the process by which his case will be presented to the jury in the sentencing phase." Thus, neither counsel was allowed to withdraw, and they were directed to proceed in a manner they believed to be in Lord's best interests.

meet its burden. The threshold burden of establishing that there was reason to doubt Lord's competency was not met.

Prosecutorial Misconduct

Lord claims that he was denied due process by misconduct during the State's closing argument. He contends that the prosecutor improperly argued that all murderers deserve the death penalty and improperly discussed the deterrent effect of the death penalty.

Lord bears the burden of establishing both the impropriety of the prosecuting attorney's comments and their prejudicial effect. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), sentence vacated on petition for writ of habeas corpus, 754 F. Supp. 1490 (W.D. Wash. 1991). Because the death penalty is unconstitutional when it is imposed mandatorily upon all murderers, Woodson v. North Carolina, 428 U.S. 280, 301, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976), Lord contends that it is improper to argue that all murderers deserve to die. Even assuming that is so, we are unconvinced that such an argument was made here.

Lord relies on the following portion of prosecutor Irene Cleavenger's argument in support of this claim:

> Finally, just these thoughts. The life of each man should be sacred to each other man. The ancients tell us unflinchingly that they executed murderers. They realized it was not enough to proclaim the sacredness and the inviolability of human life. It must be secured as well by threatening those with the loss of their own lives. Those who violate what has been proclaimed as inviolable the rights of the innocent to live, allows the invaluability of human life that's neither credible by proclamation or actually protected.

Nothing in this language suggests that all murderers deserve the death penalty. This argument does little more than establish a philosophical and historical context for the jury's decision. The jury was aware that the death penalty is not mandatory for all murderers. Indeed, the very question the jury was to answer was if the death penalty was to be imposed in this case.

Lord also contends that the prosecutor improperly discussed the deterrent effect of the death penalty in violation of Hawkins v. Rhay, 78 Wn.2d 389, 400, 474 P.2d 557 (1970). In Hawkins, the court stated that the "evidence concerning the deterrent effect of one form of penalty as opposed to another shall not be received." Hawkins, at 400.

We again take issue with Lord's characterization of the prosecutor's argument. Lord relies on the following language:

> No society can profess that the lives of its members are secure if those who do not allow

> innocent others to continue living are themselves allowed to continue living at the expense of the community.
>
> Does this secure life to punish the murderer by incarcerating him as one does a pickpocket? Murder differs in quality from other crimes and deserves, therefore, a punishment that differs in quality from other punishments.

The prosecutor did not argue that the death penalty is a more effective deterrent than life in prison without possibility of parole. There was no error.

Having found no error during the penalty phase of Lord's trial, we now turn to the statutorily mandated review of his sentence.

## STATUTORY REVIEW

The sentencing jury unanimously found beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency. Under Washington's death penalty statute, this court reviews that decision by analyzing three separate issues:

> (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
>
> (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. . . .; and
>
> (c) Whether the sentence of death was brought about through passion or prejudice.

RCW 10.95.130(2).

Sufficiency

Under the sufficiency of the evidence analysis, this court must determine if:

> "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify this affirmative finding beyond a reasonable doubt.'" State v. Rupe, 108 Wn.2d 734, 765, 743 P.2d 210 (1987) (quoting State v. Mak, 105 Wn.2d 692, 761, 718 P.2d 407, cert. denied, 107 S. Ct. 599 (1986)).

State v. Rice, 110 Wn.2d 577, 623, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). Our independent review of the record reveals the following possible mitigating circumstances: Lord has family and friends who love him and would visit him in prison; he was 26 at the time of sentencing; he is a good carpenter; his family did not help him deal with or try to understand the murder of Sylvia Henderson; he would do well in prison because of the structured environment; if sentenced to life without possibility of parole, he would never be released; he had head injuries; and he has an antisocial personality disorder.

Viewed in the context of the totality of the evidence, these mitigating circumstances are relatively unpersuasive. "[T]he mere presence of mitigating factors does not require a jury to grant leniency, so long as it is convinced beyond a

reasonable doubt that any mitigating factors are outweighed by the circumstances of the crime." Rice, at 624. Here, there was sufficient evidence to warrant the jury's decision.

The psychologist called by the defense testified that while Lord's head injuries "could exacerbate his difficulties controlling impulses", the injuries "do not entirely, in and of themselves, explain a loss of impulse control." More importantly, there was no evidence that Lord suffered from a head injury before he murdered Sylvia Henderson. The psychologist also testified that Lord has an antisocial personality disorder. However, he stated that the disorder helps to explain, but does not excuse, Lord's behavior. Furthermore, one of the diagnostic criteria for the disorder is a history of violating the rights of others. Thus, the evidence that Lord suffered from an antisocial personality disorder may very well have been discounted by the jury as a mitigating factor.

In the current case, Lord was convicted of aggravated premeditated murder in the first degree of a 16-year-old girl. Tracy Parker was raped, bludgeoned to death with a hammer, and her body was dumped by the side of a road. Lord had two prior convictions: one for second degree murder and the other

for unlawful imprisonment through violence, menace, fraud and deceit. He has been convicted three times for violent offenses against women he knew. While he acknowledged doing "terrible" things in his life, he showed no remorse for any of his crimes. There was sufficient evidence for a rational trier of fact to find that leniency was not merited.

We note that Lord does not argue that there is not sufficient evidence to support the jury's affirmative finding. Rather, he argues that the death penalty should not be imposed because there is not sufficient evidence to support his conviction. This allegation has already been addressed in our discussion of the guilt phase and is simply misplaced under this portion of our review. Moreover, Lord fails to argue which, if any, of the mitigating circumstances presented during the sentencing phase support the conclusion that no rational trier of fact could have found sufficient evidence to support the jury's affirmative answer.

Proportionality

RCW 10.95.130(2)(b) requires this court to determine:

> Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of

> this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120[.]

The statute provides a starting point by defining "similar cases". Under RCW 10.95.120, reports must be filed "[i]n all cases in which a person is convicted of aggravated first degree murder". The similar cases pool includes those cases in which the death penalty was sought and those in which it was not.

Defining the concept of "excessive or disproportionate" is more difficult. There is no clear test or guidance given in the language of the statute. We begin with a brief historical review of the impetus for, and the purpose of, proportionality review.

The process was undertaken in Washington in response to the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972); State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987). Furman prohibits sentencing procedures which create a substantial risk that death will be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 188, 49 L. Ed. 2d 859, 96 S. Ct. 2909,

reh'g denied, 429 U.S. 875 (1976). In other words, where the death penalty is imposed wantonly and freakishly, it is unconstitutional. Furman, at 310 (Stewart, J., concurring).

In Gregg, the Court upheld the constitutionality of the death penalty statute enacted by Georgia in the wake of Furman. Gregg, at 207. The Court specifically addressed the statutorily mandated proportionality review and concluded that it serves to prevent caprice in the decision to inflict the penalty by "substantially eliminat[ing] the possibility that a person will be sentenced to die by the action of an aberrant jury." Gregg, at 206. Thus, proportionality review, while not constitutionally required, provides a safeguard against arbitrarily imposed death sentences. Lewis v. Jeffers, ___ U.S. ___, 111 L. Ed. 2d 606, 622, 110 S. Ct. 3092 (1990); Pulley v. Harris, 465 U.S. 37, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984); State v. Rupe, 108 Wn.2d 734, 766-67, 743 P.2d 210 (1987).

In our earlier cases, proportionality review was somewhat truncated, in part because there was a limited pool of cases for comparison.[27] In each case, the court concluded that

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[27] Initially, this court apparently looked only to those cases where the death penalty had been sought. However, in State v. Rupe, supra at 767, it was made clear that the proper pool of cases to be reviewed includes all

the sentence was not excessive. See State v. Campbell, 103 Wn.2d 1, 30, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985); State v. Jeffries, 105 Wn.2d 398, 430, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986); State v. Mak, 105 Wn.2d 692, 722, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986), sentence vacated on petition for writ of habeas corpus, 754 F. Supp. 1490 (W.D. Wash. 1991).

Then, in State v. Harris, supra at 798, this court acknowledged that the statute "provides little guidance to determine at what point a death sentence becomes proportionate or disproportionate." Because Georgia's proportionality statute is similar to our statute, we looked to Georgia's interpretation of its statute for guidance. We then adopted the current test:

> [T]his court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics. On the contrary, we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly imposed," . . .

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cases where the defendant was convicted of first degree aggravated murder whether or not the death penalty was sought. RCW 10.95.120.

Harris, at 798 (quoting Moore v. State, 233 Ga. 861, 864, 213 S. E. 2d 829 (1975)). Relying again on the aggravating factors found as a basis for comparison, this court upheld the sentence in Harris after determining that it was not "wantonly and freakishly" imposed. Harris, at 799.

Since Harris, this court has engaged three times in proportionality review of death sentences. State v. Rupe, supra at 766-67; State v. Rice, 110 Wash.2d 577, 625, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989); In re Jeffries, 114 Wn.2d 485, 489-90, 789 P.2d 731 (1990). Although in each case we restated the language from Harris (Rupe, at 767; Rice, at 625; In re Jeffries, at 490), the method of applying that test remains to be clarified.

It is helpful to keep in mind the purpose of proportionality review and the limits inherent in such review. As the Supreme Court has repeatedly acknowledged, there can be "'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" Zant v. Stephens, 462 U.S. 862, 884, 77 L. Ed. 2d 235, 103 S. Ct. 2733, 2746 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 98 S. Ct. 2954, 2965 (1978)), cited in State v.

Mak, supra at 724 and State v. Rupe, supra 766-67. Our concern is with alleviating the types of major systemic problems identified in Furman: random arbitrariness and imposition of the death sentence based on race. Gregg, at 188; Furman, at 257, (Douglas, J., concurring). Technical inconsistencies in a line-by-line comparison cannot be equated with those core concerns. Pulley v. Harris, 465 U.S. at 54; State v. Mak, supra at 724; see also State v. Rupe, supra at 766-67.

Our review is not intended to ensure that there can be no variation on a case-by-case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances. As we explained in a prior case:

> Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it.

In re Jeffries, at 490. Requiring precise uniformity would not only be unworkable, it would effectively eliminate the death penalty. Indeed, the jury is directed to tailor its decision to the individual circumstances of the crime. A jury could decline to impose the death penalty because a particular defendant deserves mercy. However, the decision to afford one defendant

mercy, and yet not another, does not violate the constitution. Gregg, at 199; State v. Mak, supra at 724.

Lord would have us review his case as a forensic scientist analyzes fingerprints, looking for a specified number of identity points. Only if one can conclusively determine that each swirl, ridge, and whorl is present in both samples is a match declared. We decline to do this. Crimes, particularly the brutal and extreme ones with which we deal in death penalty cases, are unique and cannot be matched up like so many points on a graph.

Our approach, perhaps, can instead best be explained as a search for "family resemblances". See L. Wittgenstein, Philosophical Investigations §§ 65-67 (1958). Although the cases where death was imposed do not necessarily have one characteristic or set of attributes in common, we nonetheless recognize that they are somehow related. This relation cannot easily be described; it consists of a complicated network of overlapping similarities --much like members of the same family, who can be recognized as relatives, even though they do not all share any one set of features. Thus, we examine prior

cases for those which belong together because they resemble each other.

With the foregoing in mind, we have reviewed both the reported cases and the filed reports as required by RCW 10.95.130(2)(b). We turn now to the application.

We first consider the crime of which Lord was convicted. Lord murdered a single victim, 16-year-old Tracy Parker. Two other defendants who are currently under sentence of death were convicted of only one aggravated first degree murder. Report of the Trial Judge, State v. Furman, Kitsap Cy. cause 89-1-00304-8 (Mar. 9, 1990); Report of the Trial Judge, State v. Harris, Pierce Cy. cause 84-1-01190-6 (Jan. 18, 1985). Moreover, unlike Furman and Harris, Lord had previously been convicted of murder.[28] Similarly, in other single victim rape-murder cases where death was not sought, the defendant had not previously committed murder. E.g., Report of the Trial Judge, State v. Thomas, King Cy. cause 86-1-04723-5 (Feb. 22, 1991).

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[28] While Harris had killed before, he was only convicted of manslaughter, which requires a reckless or negligent mental state rather than the intentional mental state supporting Lord's second degree murder conviction. Report of the Trial Judge, State v. Harris.

The jury found Lord guilty of premeditated first degree murder with the following aggravating circumstances: The murder was committed to conceal the commission of a crime; to conceal Lord's identity; and in the course of, or in immediate flight from, the crimes of rape or kidnapping. RCW 10.95.020(7), (9) (Verdict Form A; Special Verdict Form A-1). Only one aggravating factor is needed for the prosecutor to seek, or a jury to impose, the death penalty, provided there are not sufficient mitigating circumstances to warrant leniency. RCW 10.95.020, .030. Lord's sentence is proportionate to sentences given in other cases given the aggravating factors that were found. Report of the Trial Judge, State v. Jeffries, Clallam Cy. cause 6488 (Nov. 29, 1983) (conceal identity and multiple victims); Report of the Trial Judge, State v. Rupe, Thurston Cy. cause 81-1-00316-1 (July 12, 1982) (conceal identity, multiple victims, and in the course of robbery); Report of the Trial Judge, State v. Benn, Pierce Cy. cause 88-1-01280-8 (July 23, 1990) (multiple victims).

Finally, Lord bludgeoned Tracy to death with a hammer, inflicting multiple blows to her head, teeth and genitals. Because the medical examiner was unable to determine the

sequence of the blows, there is no way to tell how much Tracy suffered before dying. Lord's method of murder was more vicious and took longer than that employed by other defendants sentenced to death. Report of the Trial Judge, State v. Rupe (single gunshot wound to head); Report of the Trial Judge, State v. Harris (quick murder); Report of the Trial Judge, State v. Hazen, Clark Cy. cause 85-1-00322-5 (Apr. 21, 1986) (no struggle preceded gunshots); Report of the Trial Judge, State v. Jeffries (no evidence of any torture; gunshot wounds). It was also more brutal than the murders in several cases where death was not imposed. Report of the Trial Judge, State v. Knight, King Cy. cause 86-1-01678-0 (Feb. 4, 1991); Report of the Trial Judge, State v. Thomas, King Cy. cause 86-1-04723-5 (Feb. 22, 1991).

Next we consider Lord's personal characteristics. Lord has established a pattern of violent behavior. He has two prior convictions for violent crimes against women he knew. At age 14, he murdered a family friend by shooting her with two different guns while she was on the telephone calling for help. When he was 19, he was convicted of the unlawful imprisonment of his sister-in-law, who was hospitalized as a

result of injuries inflicted by Lord. Additionally, Lord volunteered information during his unsworn statement to the jury that he had served time in jail for driving his car head on into a truck while driving drunk, badly injuring a friend of his. After the accident, he continued to drink and smoke marijuana.

Lord has also established a pattern of noncompliance with probation conditions and prison regulations. Lord violated the conditions of his probation from his second degree murder conviction. He also told the jury that he had asked his wife to smuggle marijuana into him while he was in prison for the unlawful imprisonment conviction.

Nor is Lord's sentence disproportionate on the basis of his criminal record. One defendant currently on death row had no prior convictions. Rupe, 108 Wn.2d at 770. Lord's willingness to take another life, Tracy's, after having been convicted of murder at an early age, indicates that he continues to pose a threat to others. Moreover, Lord did not present evidence of sufficiently compelling mitigating circumstances, such as those noted in cases where death was not sought. Report of the Trial Judge, State v. Ortiz, Whatcom Cy. cause 81-1-00201-6 (Dec. 9, 1981) (defendant retarded); Report of the

Trial Judge, State v. Cummings, Walla Walla Cy. cause 85-1-00044-4 (Dec. 20, 1989) (defendant 16 years old).

Lord was 26 years old at the time he raped and murdered Tracy Parker. However, his relatively young age does not render his sentence disproportionate. Younger defendants have been sentenced to death. Report of the Trial Judge, State v. Furman (17 years 10 months); Report of the Trial Judge, State v. Hazen (19 years).

Given the nature of Lord's crime, the number of aggravating factors, his prior convictions and personal history, we cannot conclude that his death sentence was excessive or disproportionate. In comparing his crime and personal history with similar cases, we find that Lord's case sufficiently resembles those in which a sentence of death was imposed. Thus, we hold that the required proportionality is present here.

Lord also contends that the reports on file with this court do not provide enough information for this court to perform a meaningful review. However, as the State notes, the reports on file are in compliance with RCW 10.95.120 and are, therefore, sufficient under the statute.

In a related, and novel, argument, Lord contends that the trial judge should have allowed the jury to learn of "the sentences that other defendant's who had committed a murder during the course of a rape typically received." Brief of Appellant, at 110. The sole authority cited for this argument is ER 401, which defines relevance.

The death penalty statute, which provides an illustrative list of eight factors the jury may consider in deciding if sufficient mitigating circumstances exist to merit leniency, allows the jury to consider those circumstances that arise in connection with the specific crime and defendant. RCW 10.95.070. Decisions of this court, State v. Jeffries, 105 Wn.2d 398, 422, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986), and of the United States Supreme Court, Eddings v. Oklahoma, 455 U.S. 104, 110, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978); Woodson v. North Carolina, supra at 304, are in accord. The trial court correctly rejected this evidence as irrelevant.

Passion or Prejudice

Our review of the record discloses no competent evidence that the imposition of the death penalty came about

through passion or prejudice, RCW 10.95.130(2)(c), nor does Lord offer such evidence. Rather, in support of his claim, he merely reiterates alleged trial errors already addressed in other parts of this opinion. We conclude that Lord's sentence was not the result of passion or prejudice.

Constitutional Challenges to the Death Penalty

Finally, Lord challenges the constitutionality of Washington's death penalty statute, RCW 10.95, on a number of grounds. He raises the following 14 issues: (1) Does the statute violate the separation of powers doctrine? (2) Does the statute violate the equal protection clauses of the federal and state constitutions? (3) Is it unconstitutionally void for vagueness? (4) Does it constitute an unlawful delegation of legislative authority to the executive branch of government? (5) Does the imposition of the death penalty constitute cruel and unusual punishment? (6) Should Lord have been charged by grand jury indictment instead of by information? (7) Does the combined effect of the statute and not obtaining a grand jury indictment exacerbate the violation of separation of powers doctrine? (8) Does the statute amount to a mandatory death penalty in violation of the Eighth Amendment and article 1, section 14 of

the state constitution? (9) Does it unconstitutionally shift the burden of proof on the death penalty issue to the defendant? (10) Is defendant's right to appellate review denied because the statute does not require the jury to articulate which mitigating circumstances were found and how they were weighed? (11) Does RCW 10.95.130(2)(b) constitute a legislative encroachment upon an exclusively judicial function, violating the separation of powers doctrine? (12) Does RCW 10.95.120 deny a defendant the right to a fair trial, due process of law, effective assistance of counsel, and confrontation by failing to provide defendant a right to rebut information given to the trial judge? (13) Does the statute promote unequal administration of law in violation of the Fourteenth Amendment? (14) Is RCW 10.95.020 unconstitutional because it does not genuinely narrow the class of persons eligible for the death penalty? Each of these questions was answered in the negative in the following cases: State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984) (issues 1-5), cert. denied, 471 U.S. 1094 (1985); State v. Ng, 104 Wn.2d 763, 713 P.2d 63 (1985) (issue 6); State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922 (1986) (issues 7-12); State v. Dictado, 102 Wn.2d 277, 687 P.2d 172

(1984) (issue 13); State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984) (issue 14).

Lord raises a number of other issues through both appellate counsel and his pro se brief. We have reviewed each of these issues and conclude that none of them merit individual attention.

In conclusion, this tragic case was surely one of the most complex ever tried in this state. The overwhelming amount of technical evidence, scores of witnesses, and seriousness of the charge combined to create a legal maelstrom. Nonetheless, the trial judge carefully protected Brian Keith Lord's right to a fair trial and ensured that the punishment imposed, while harsh, was just. We commend her.

The judgment and sentence in this case are affirmed.

/s/Durham, J.

WE CONCUR:

/s/Andersen, J.

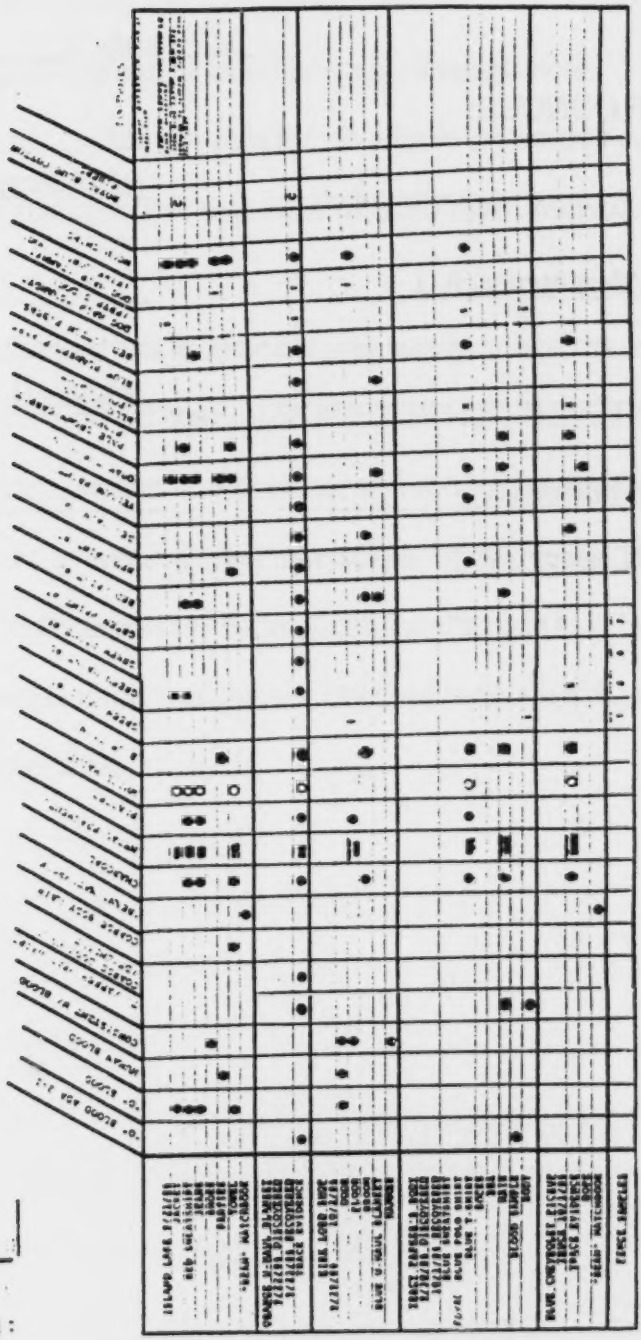
/s/Brachtenbach, J.

/s/Guy, JJ.

/s/Dolliver, J.

/s/Callow, J.P.T.

# APPENDIX



54385-2

State v. Lord

Majority by Durham, J.

Dissent by Utter, J.

Concurrence in the result of the dissent by Dore, C.J.

No. 54385-2

DORE, C.J. (concurring in the result of the dissent) – In previous review of capital punishment cases before this court to wit:

State v. Campbell, 103 Wn. 2d 1
State v. Harris, III, 106 Wn. 2d 784
State v. Jeffries, 105 Wn. 2d 398
State v. Mak, 105 Wn. 2d 692
State v. Rice, 110 Wn. 2d 577
State v. Rupe, 108 Wn. 2d 734
State v. Rupe, 101 Wn. 2d 664

I affirmed the jury verdicts of death. For the first time in the ten years I have been on the Supreme Court I now dissent on a capital punishment case.

I dissent because I feel the defendant did not have a fair trial. I concur in Justice Utter's dissent based on the following particulars:

I agree with the dissent that the trial court committed reversible error in allowing the summary chart to go into the jury room with the jury. I also agree that the court erred when, during the sentencing phase, it admitted information elicited from Lord's father concerning Lord's convictions for second degree murder and unlawful imprisonment and his probation violations and flight from police. The prejudicial effect of this evidence greatly outweighed its rebuttal value. State v. Bartholomew, 101 Wn.2d 631, 643, 683 P. 2d 1079 (1984).

This case should be reversed and remanded for a new trial.

/s/Dore, C/J
Dore, C. J.

State v. Lord

Majority by Durham, J.

Dissent by Utter, J.

No. 54385-2

UTTER, J. (dissenting) --I dissent for four reasons. First, the challenged summary chart[1] is inaccurate and argumentative. As a result, the trial court erred both in admitting the chart and in sending it to the jury room. Second, the evidence the State elicited during the cross examination of Lord's father was prejudicial and did not rebut any mitigating evidence. Therefore, admission of that evidence violates the rule set out in State v. Bartholomew, 101 Wn.2d 631, 683 P.2d

[1] My use of the phrase "summary chart" refers to exhibit 143. Exhibit 143 is an 8-foot by 4-foot chart that purports to summarize the testimony of several experts. Although I believe there are problems with both exhibits 141 and 143, I will directly address only those problems related to 143.

1079 (1984) (Bartholomew II)[2]. Third, the trial court erred in allowing the State to cross-examine Lord's allocution statement. Fourth, Lord's sentence is disproportionate to that generally given in similar cases.

The error in admission of the summary chart is constitutional error since it violates Lord's right to due process. Therefore the error requires reversal unless the State proves beyond a reasonable doubt that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied 475 U.S. 1020 (1986). The State has not met its burden, and we should reverse the finding of guilt. Even if that were not the case, the errors in the sentencing phase require the vacation of the sentence. Therefore, I dissent.

I

Summary Chart

As the majority correctly points out, the danger in a summary chart is that the jury "might rely upon the alleged facts in the summary as if these facts had already been proved or as a

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[2] State v. Bartholomew 98 Wn.2d 173, 654 P.2d 1170 (1982) (Bartholomew I) was vacated by the United States Supreme Court and the case remanded for reconsideration.

substitute for assessing the credibility of witnesses." Majority opinion, at 29. That is exactly the problem in this case.

The State's theory is that Lord killed Parker in his brother's workshop, wrapped her body in an orange U-Haul blanket, and used his brother's truck to dispose of the body. To support that theory, the State presented hundreds of pieces of trace evidence that purportedly link Parker to the blanket, the workshop, and the truck. The chart supposedly summarizes the experts' testimony surrounding that evidence.

In fact, the chart does not accurately summarize that testimony. Instead, the chart summarizes the State's interpretation of the experts' testimony. All of the experts' testimony was necessarily speculative and inconclusive. Yet the chart takes that speculative, inconclusive testimony and converts it into definitive, conclusory statements. In so doing, the chart unfairly argues only the State's theory of the case.

For example, there is a category on the chart labeled "T. Parker Head Hairs". The key piece of evidence allegedly linking all of the trace evidence to Lord and Parker is the orange U-Haul blanket. The crime lab found a human hair on the blanket. Cindy Jay testified it is impossible to determine for

certain who is the source of a particular hair sample.[3] The best she could conclude was that "Tracy Parker cannot be eliminated as the source" of the hair found on the blanket.[4] The chart, however, shows positively that one of Parker's head hairs was found on the blanket. In looking at the chart one reaches the inevitable conclusion that Parker had contact with that blanket. Thus the chart takes the speculative testimony that the hair might be Parker's, draws the inference most favorable to the State, and improperly concludes for the jury that the hair is Parker's.

Similarly, there is a category on the chart labeled "Coarse Body Hair (Defendant)". The testimony, however, established only that the hair "could have" come from the defendant.[5] The chart again unfairly draws the conclusion for the jury that the hair is that of the defendant.

The majority concludes any possible prejudice from the coarse body hair category "was eliminated by Lord's concession during closing argument that he had contact with the orange blanket." Majority opinion, at 35. Lord, however, conceded nothing. He did not testify in the guilt phase of the trial. His

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[3] Report of Proceedings, vol. XXIII at 3815.

[4] Report of Proceedings, vol. XXIII at 3905.

[5] Report of Proceedings, vol. XXIII at 3920; vol. XXX at 4914.

attorney, in closing, did concede Lord had contact with the blanket. That "concession", however, is not dispositive of the issue of whether the hair did in fact come from Lord. Furthermore, that statement is not substantive evidence that the jury may consider.

The majority travels over shaky ground when it concludes an attorney in a criminal case may "concede" a fact for the attorney's non-testifying client. Such a conclusion raises serious questions about ineffective assistance of counsel and about the defendant's right to remain silent. It also ignores the precept that an attorney's argument is not evidence. In support of this dangerous proposition, the majority cites only United States v. Abbas, 504 F.2d 123 (9th Cir.1974), cert. denied 421 U.S. 988 (1975). There is no language in Abbas, however, referring to any concessions of either the defendant or his attorney. Abbas simply does not support the majority's conclusion on this issue.

A few other examples of the chart's inaccuracies will suffice to show how it unfairly mischaracterizes the testimony. No expert examined the wood chips or testified that they had a

common source.[6] Yet the chart links all of the chips together and leads to the inescapable conclusion that the chips are from a common source. Similarly, there was testimony that the orange fibers "could have" a common source.[7] Yet the chart conclusively links all of the fibers together. The same is true of all of the paint samples and metal fragments listed. The testimony was always that they "could have" a common source, or that they were "similar". Yet the chart conclusively links all of them together, and one viewing the chart cannot help but conclude all of the trace evidence did in fact come from a common source.

The prosecutor argued this very point to the jury. In her closing the prosecutor referred to the chart and said:

> the [trace evidence] items within here match with the orange blanket, match with items from the shop, match with items on Tracy Parker's body, match with the truck . . .

Report of Proceedings, vol. XLVI at 7312. While it is proper for the prosecutor to draw such inferences from the testimony, it is improper for the chart to show the evidence in such a conclusory form. Lloyd v. United States, 226 F.2d 9, 17 (5th Cir. 1955).

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[6] Report of Proceedings, vol. XXXVIII at 6072.

[7] Report of Proceedings, vol. XXXVI at 5922-25.

The prejudice that results from such evidence is clear. The State used the testimony concerning all of the different samples of trace evidence to link Lord to the blanket, and the blanket to the victim. That is certainly a proper inference for the prosecutor to draw from the evidence. The chart, however, moves out of the realm of inference and into the realm of fact. The chart inescapably leads an observer to conclude that all of the trace evidence did in fact come from the same source, and that therefore (for example) the red paint found on Tracy Parker's hair is the same as the red paint found on the blanket and on the broom in Kirk Lord's workshop. Thus testimony that the three red paint chips were "similar" is transformed into a statement that the chips were the same. When taken together, the transformation of the speculative, inconclusive testimony about all of the hundreds of pieces of trace evidence into a conclusive display of fact unduly prejudiced Lord. The chart misleads the jury by unfairly emphasizing the State's case, and it creates the impression that the underlying facts upon which the chart is based have been conclusively established. Therefore, the trial court erred in admitting the chart. Accord 5 J.

Weinstein & M. Berger, Evidence § 1006[07], at 1006-15 (1989).

The trial court then compounded the error by sending the chart to the jury room. Inaccurate summary charts should not be sent to the jury room. United States v. Cox, 633 F.2d 871, 874 (9th Cir. 1980), cert. denied 454 U.S. 844 (1981).[8] Such evidence "present[s] an unfair picture of the testimony at trial and can be a potent weapon for harm due to its great persuasiveness." Cox, 633 F.2d, at 874. Admitting inaccurate, misleading charts inevitably prejudices the defendant and requires reversal. United States v. Altruda, 224 F.2d 935, 942 (2nd Cir. 1955).

According to the majority, any prejudice caused by the errors in the chart were cured by the fact the jurors heard the equivocal and uncertain nature of the experts' testimony. The majority believes that because the jurors heard all of the testimony, then they could not have been misled by the chart's inaccuracies. In fact, the opposite is true.

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[8] Accord United States v. Abbas, supra; United States v. Espinosa, 771 F.2d 1382 (10th Cir. 1985); Pierce v. Ramsey Winch Co., 753 F.2d 416 (5th Cir. 1985); United States v. Scales, 594 F.2d 558 (6th Cir. 1979) cert. denied 441 U.S. 946 (1979); United States v. Conlin, 551 F.2d 534 (2nd Cir. 1977) cert. denied 434 U.S. 831 (1977).

As the majority points out, the State's experts testified for all or part of 18 days. Much of the testimony was repetitive and monotonous. The experts referred to many of the exhibits by two and sometimes three different identification numbers.[9] Buried within all of that testimony were the equivocal statements that various pieces of trace evidence "could have" come from a common source.[10] Thus the jurors could easily have been confused as to what exactly was being testified to. Once the jurors were in their deliberations, it would have been

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[9] The following exchange illustrates this problem.

> Q. To begin with [paint] type No. 1, which did you assign into that classification? Any of these that we've just talked about?
>
> A. Type No. 1 I assigned from EO 1. Those are the sweepings from the workshop, AK 3, that's the fence post, and also N 06, which is the debris from Tracy Parker's leg.
>
> Q. When did you microscopically look at paint samples from AK 3, which is State's Proposed Exhibit 131B, as in baker?

Report of Proceedings, vol. XXXVI at 5847.

[10] See e.g. Report of Proceedings, vol. XXXV at 5757 (paint chips were "similar"); 5760 (white paint chips "could have" a common source); Report of Proceedings, vol. XXXVI at 5841 (green paint chips are "similar"); 5858 (same); 5909 (yellow paint chips "could have come from the same source"); 5925 (orange fibers "could have come from the blanket"); Report of Proceedings, vol. XXXVII, at 5944 (pale grayish brown fibers "could share a common origin").

easy and perhaps natural for them to rely heavily on the chart and its inaccuracies.

Thus the jury may have relied "upon the alleged facts in the summary as if these facts had already been proved or as a substitute for assessing the credibility of witnesses." Scales, 594 F.2d at 564. Furthermore, sending the chart to the jury room allowed the chart to become a continuing voice for the State's interpretation of the evidence. The fact that the jury may have relied on the inaccurate chart is enough to establish prejudice.

Reversal is required unless the State proves beyond a reasonable doubt that the error was harmless. The error was harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The State has not met its burden of proving the error harmless.

The majority concludes that the prejudice caused by sending the chart to the jury room was eliminated by the court's limiting instruction, and by the defense cross examination of the experts. However, limiting instructions cannot cure the error

where, as here, the chart is too conclusory and emphasizes too much of the State's case. Scales, 594 F.2d, at 564.

The majority relies primarily on United States v. Abbas, 504 F.2d 123 (9th Cir. 1974), cert. denied 421 U.S. 988 (1975), to support the argument that a limiting instruction and an opportunity to cross-examine cures error. Abbas is distinguishable because there the Court found the challenged charts contained no errors related to the counts for which the jury convicted the defendant. 504 F.2d, at 126. In contrast, exhibit 143 here contained numerous errors by inaccurately summarizing the experts' inconclusive testimony as conclusively proven facts. The majority also cites United States v. Krasn, 614 F.2d 1229 (9th Cir. 1980). There is nothing in Krasn, however, that indicates there were in fact errors in the challenged chart.

The most critical distinction between the cases the majority cites and this case is that none of the cases the majority relies on are capital cases. As the majority correctly observes, we are required to apply heightened scrutiny in capital cases.[11] Thus the reasoning in noncapital cases is not dispositive.

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[11] The majority insists that this court should only apply greater scrutiny to the sentencing phase of a capital trial. As the Supreme Court recently stated in Murray v. Giarratano, 492 U.S. 1, 8, 106 L.Ed.2d 1, 109 S.

Ct. 2765, 2770, (1989): "We have recognized on more than one occasion that the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." In particular, the Court in Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980) recognized the importance of heightened judicial scrutiny of both the guilt and sentencing phases of a capital case. The Court in Beck invalidated an Alabama rule that prohibited an instruction on a lesser included offense in the guilt phase of a capital trial. After noting that there is a significant constitutional difference between the death penalty and lesser punishments, the Court wrote:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

(Footnote omitted.) 447 U.S. at 638. Such heightened scrutiny is appropriate during the guilt phase of a capital case, because procedural irregularities during the guilt phase can unfairly expose a defendant to the death penalty. Recently, the Kentucky Supreme Court recognized the higher standard of review at both the guilt and penalty phases of cases where the death penalty was imposed. Cosby v. Commonwealth, 776 S.W.2d 367, 369 (Ky. 1989).

Moreover, this court itself has recognized that the guilt phase of capital cases is qualitatively different from the guilt phase of noncapital cases. For example, in State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986), this court took a liberal approach to construing procedural rules in the guilt phase of a capital case. In Jeffries, this court allowed the defendant to challenge jury instructions even though no objection to them was made at trial. The usual rule is that this court does not review an issue where the proper objection is not made at trial. State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). Thus, contrary to the majority's assertion, the guilt phase of a capital case and the guilt phase of a noncapital case are not treated identically.

The purpose of heightened scrutiny is to assure the existence of the greater degree of reliability that is required before the death penalty may be imposed. Murray v. Giarratano, 492 U.S. 1, 8-9, 106 L. Ed. 2d 1, 109 S. Ct. 2765, 2770 (1989). That greater degree of reliability requires not only a heightened scrutiny, it also requires special constraints on procedures used to convict a defendant of a capital offense. Murray, 492 U.S. at 8-9. Thus procedures that are permissible in a noncapital case are not always allowable in a capital case.

In Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978), the Court held capital juries cannot be precluded from considering any relevant mitigating evidence, including aspects of the defendant's character. The Court acknowledged, however, that state legislatures are free to limit the evidence a noncapital sentencer may consider. 438 U.S. at 603. The Court also acknowledged that legislatures are free to enact mandatory sentences in noncapital cases. 438 U.S. at 605 n. 13. A legislature may not, however, enact a mandatory death penalty. Woodson v. North Carolina, 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976).

In Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), the Court held a death sentence may not be imposed where a statute prohibited the jury from considering a lesser included, noncapital offense. The Court noted that while the constitution does not require the giving of lesser included offense instructions in noncapital cases, the need for heightened reliability in capital cases means the trial court must give such instructions where warranted by the evidence. 447 U.S., at 637-38.

Thus the constitution requires not only that we engage in a closer, more careful review of the record, it also requires us to determine that the procedures used meet the standard of increased reliability. The trial court erred both in admitting the chart and in sending that chart to the jury room. Even if that error could be corrected in a noncapital case by giving a limiting instruction and allowing cross examination, the qualitative difference between the death penalty and any other punishment requires us to apply stricter procedures and heightened scrutiny in this case.[12] The admission of the chart

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[12] Cf. Caldwell v. Mississippi, 472 U.S. 320, 329, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) ("the qualitative difference of death from all

and the trial court's subsequent decision to send the chart to the jury room undermine the reliability of the jury's decision. Therefore this court should reverse the finding of guilt.

II

A. Violation of Bartholomew

State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984) (Bartholomew II), limits the evidence the State may present at the penalty phase of a capital trial. The State is

> limited to defendant's criminal record, evidence that would have been admissible at the guilt phase, and evidence to rebut matters raised in mitigation by the defendant.

101 Wn.2d, at 642. Any rebuttal evidence the State offers is subject to a balancing test similar to that contemplated by ER 403. 101 Wn.2d, at 643. Such evidence is only admissible if its rebuttal value outweighs its prejudicial effect. 101 Wn.2d, at 643.

As discussed below, the challenged evidence in this case does not properly rebut any mitigating evidence. Additionally, even if that evidence had some slight rebuttal value, that value is

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other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

outweighed by the evidence's prejudicial effect. Therefore the court erred in admitting all of the challenged evidence.

The majority acknowledges the Bartholomew test and then analogizes it to ER 405. That analogy ignores a basic difference between the two tests. ER 405(a) states:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

Thus, under ER 405, once character evidence is introduced there is a presumption that rebuttal evidence is admissible.

Under the Bartholomew test, however, there is a presumption that rebuttal evidence is inadmissible. The rule as stated in Bartholomew II is:

> Only if the rebuttal value of the evidence outweighs the prejudicial effect should the evidence be admitted.

101 Wn.2d, at 643. Thus the presumption is that rebuttal evidence is inadmissible. The State can overcome that presumption by proving that the evidence's rebuttal value outweighs its prejudicial effect.

Applying the Bartholomew test is a two step process. The first step is to determine whether the offered evidence has

any rebuttal value. If the evidence has no rebuttal value, it is inadmissible. Once it is established that the evidence has some rebuttal value, the second step is to determine whether that rebuttal value outweighs the evidence's prejudicial effect. If it does not, then the evidence is inadmissible.

Lord assigns error to the admission of evidence elicited during the State's cross examination of his father, Leslie.[13] Specifically, Lord argues the trial court erred in allowing the State to elicit information concerning the facts underlying Lord's second degree murder conviction and his conviction for unlawful imprisonment, the fact that he violated probation, and the fact that he fled from the police. Because I believe both that none of that evidence was proper rebuttal evidence, and that the evidence is prejudicial, I would vacate Lord's sentence.

The majority concludes that all of the challenged evidence was properly admitted to rebut the "evidence of good character offered by Lord's father." Majority opinion, at 83. As an example of the supposed evidence of "good character", the majority cites two exchanges in which Leslie said his son was a "good boy". Read in the proper context of the entire direct

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[13] I will follow the majority's terminology and refer to the defendant as "Lord" and to all other family members by their first name.

examination, however, those comments cannot properly be seen as being offered as evidence of good character.

The first such comment occurred in the following exchange:

> Q. Could you describe for this jury what type of child Keith was up until the age of 14?
>
> A. He was a good boy, a loving kid and just a real good kid. . . .

Report of Proceedings, vol. L at 7723. Taken in proper context, Leslie's testimony was that his son was a good boy up until the age of 14. All of the challenged evidence concerns events that happened after Lord turned 14. There is no evidence that suggests Lord was not "a good boy" prior to turning 14. Thus none of the State's evidence rebuts Leslie's testimony.

The following exchange occurred at the end of the defendant's direct examination of Leslie.

> Q. Les, do you know what Keith has been convicted of?
>
> A. Yes, I do.
>
> Q. You know what his past is, don't you?
>
> A. Yes.
>
> Q. How do you feel about him now?
>
> A. I love him dearly. I love him. He's a good boy.

Report of Proceedings, vol. L at 7730. That was the last question and answer in the direct examination. Taken in context, the statement "[h]e's a good boy" cannot reasonably be interpreted as evidence of Lord's good character. Instead, it was simply a profession of a father's love for his son, despite all of the son's mistakes. The statement was not a positive factual assertion that warranted rebuttal. It was an emotional response to the question "How do you feel about [defendant]?" (italics mine).

This conclusion is borne out by Leslie's later answer to one of the prosecutor's questions. In response to the prosecutor's question of whether he still considered his son to be a good boy, Leslie replied: "Well, I still love him. He's my son." Report of Proceedings, vol. L at 7740. This shows that Leslie was not offering an objective opinion as to his son's character. Instead, he was simply reaffirming that he still loved his son.

This is not a case where a witness must be impeached with specific instances of the defendant's bad conduct in order to give the jury a proper context for evaluating the witness' testimony. Leslie testified he knew about all of his son's convictions, and about the facts of the Tracy Parker murder, but

still loved his son. The jury knew about Leslie's bias, and could evaluate how much weight to give his testimony. In light of that, there was no need to attempt to "impeach" Leslie. Nothing in his testimony could have reasonably left a false impression as to Lord's character. The only impression the testimony could have reasonably left with the jury was that Leslie still loved his son.

Leslie did offer as mitigating evidence the fact that his son was a good carpenter and that his son had been in a serious car accident. The fact that Leslie loved his son may also be considered mitigating evidence. See e.g., Payne v. Tennessee, ___ U.S. ___, 115 L. Ed. 2d 720, 111 S. Ct. 2597, 2602, 59 U.S.L.W. 4814 (1991), Jones v. Butler, 864 F.2d 348, 366 (5th Cir. 1988), cert. denied 490 U.S. 1075 (1989). However, none of the State's challenged evidence rebuts that mitigating evidence. Therefore the evidence's rebuttal value is nonexistent, and it was error to admit that evidence.

Even if the evidence has some rebuttal value, that rebuttal value does not outweigh the evidence's prejudicial effect. Therefore the court still erred in admitting that evidence.

On cross examination the State elicited information that the victim in Lord's unlawful imprisonment conviction was hospitalized. The majority asserts this was not prejudicial because the jury already knew the crime was "effected by violence, menace, fraud, and deceit". The majority concludes "[t]he infliction of injuries is inherent in a crime committed by violence." Majority opinion, at 83. That conclusion defies both common sense and the law.

Injury simply is not an inherent part of a crime of violence.[14] In Washington, a "violent offense" is defined as any class A felony or attempt to commit a class A felony. RCW 9.94A.030(33). That definition obviously encompasses many crimes that do not result in injury to the victim. Similarly, Black's Law Dictionary, at 1408 (5th ed. 1979) defines "violence" as:

> Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. . . . Physical force unlawfully exercised; . . . The exertion of any physical force so as to injure, damage or abuse.

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[14] Even if it were, the testimony here went much further. Leslie Lord testified not just that the victim was injured, but that she was hospitalized as a result of her injuries. Report of Proceedings vol. L, at 7737.

(citations omitted). That definition also encompasses many acts that do not result in injury.

More importantly, the California statute Lord violated does not define "violence" as necessarily including injury. Lord pleaded guilty to a violation of Section 236 of the California Penal Code. That section defines the general crime of false imprisonment. Section 237 then goes on to define felony false imprisonment as imprisonment "effected by violence, menace, fraud, or deceit". "Violence" is defined as "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint." California Jury Instructions: Criminal, § 9.60, at 512 (5th Ed. 1988). Thus, under the California law applicable to Lord's conviction, injury is not an inherent part of "violence".

The State also elicited on cross examination the fact that the victim of the unlawful imprisonment was a teenager. Contrary to the majority's conclusion, that information was also prejudicial. Prior to the cross examination of Leslie Lord, the jury knew only that the defendant had been convicted of unlawful imprisonment of a woman. After the cross examination, the jury knew the victim was a teenager, was

injured and hospitalized, and that the incident involved the defendant giving the victim a ride in his car. Thus the improper cross examination elicited information that highlighted the similarities between the unlawful imprisonment conviction and the murder of Tracy Parker. It is the similarity between the improperly elicited evidence and the murder of Parker that creates prejudice. Cf. State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983) (prejudice arising from introduction of prior crimes under ER 609 is great where the prior crime is similar to the charged crime) (Utter, J., concurring in the result); State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987) (same).

The State also elicited evidence that Lord violated the conditions of his probation and attempted to escape from the police. The majority argues any prejudice arising from that evidence is "insignificant given that the jury was properly aware of both of Lord's prior convictions for violent crimes." Majority opinion, at 84. Taken to its logical conclusion, the majority's argument would mean almost no error would ever prejudice a defendant with a violent past. Indeed, the next logical step in the majority's analysis is to conclude that the prejudice would be insignificant given that the jury was already properly aware of

the circumstances of the Parker murder. After all, how prejudicial is a probation violation in light of a conviction for aggravated first degree murder? Such a decision would, of course, make a mockery of the reasoning in Bartholomew I & II. It would also ignore our responsibility to assure that any person sentenced to death is afforded due process.

Furthermore the evidence of the alleged probation violation is exactly the kind of unreliable evidence warned against in Bartholomew II. The only evidence of any probation violation came out in the cross examination of Leslie. The following exchange shows how unreliable that evidence is.

> Q. So [the defendant] did not obey the Court's order of probation after he was placed on probation for the crime of murder in the second degree?
>
> A. Well, I don't know really if he did or not.
>
> Q. Did he have to spend 30 days in jail because he did not obey the probation rules for this homicide?
>
> A. I wouldn't know for sure about that. I know he was in jail there for -- I don't remember whether it was 30 days or 20 days, but he was, and I don't recall what it was for.

Report of Proceedings, vol. L at 7734-35. The State presented no other evidence that Lord was ever found guilty of a probation violation. Thus the evidence of that alleged violation lacks the

reliability necessary to make it admissible in a capital sentencing proceeding. See Bartholomew II, 101 Wn.2d, at 640-41.

As pointed out earlier, Bartholomew creates a presumption that rebuttal evidence is inadmissible. The State can overcome that presumption by proving beyond a reasonable doubt that the evidence's rebuttal value outweighs its prejudicial effect. Where the evidence is as unreliable as is the evidence of the alleged probation violation, the State can never meet that burden.

There is also no reliable evidence of Lord's alleged attempt to flee the police. During the course of cross examination, Leslie testified his son left the scene of the false imprisonment crime and that the police chased his son. Report of Proceedings, vol. L at 7739. That testimony was based on Leslie's recollection of police reports he had read "years ago" and which he acknowledged he could not accurately remember. Report of Proceedings, vol. L at 7737. Leslie never discussed the incident with his son. Report of Proceedings, vol. L at 7738. The only evidence of Lord's attempted flight was the incomplete hearsay recollections of Leslie. That evidence is surely not reliable enough to have any rebuttal value in a capital case.

The State also improperly elicited information concerning Lord's second degree murder conviction. The cross examination improperly brought out inflammatory facts about the details of the murder. There was no reliable corroborating evidence of any of those facts, and many were based on hearsay.[15] Those facts were not relevant to rebut any mitigating evidence. Therefore the court erred in allowing that cross examination.

The majority concludes that none of the challenged evidence discussed above was unduly prejudicial. The prosecutor's closing argument belies that conclusion. In her closing argument the prosecutor emphasized all of the erroneously admitted evidence. She paid particular attention to

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[15] Q. How was she murdered?

A. She was shot.

B.

Q. From one gun or two guns?

"A. Well, they said there was two guns involved.

"Q. Two separate guns she was shot with; isn't that correct, Mr. Lord?

"A. That's what they said, yes."

Report of Proceedings vol. L, at 7731.

the facts surrounding Lord's two previous convictions, and made powerful arguments that could not help but play on the jurors' emotions.[16] She emphasized that the victim in the false imprisonment case "was a teenager, just like Tracy Parker." Report of Proceedings vol. LI, at 7883. Thus all of the improperly elicited information was used to Lord's prejudice.

Improperly admitting the evidence allowed the State to argue nonstatutory aggravating factors to the jury. The danger in allowing such evidence is that it

> opens too wide a door for the influence of arbitrary factors on the sentencing determination.

Bartholomew I, 98 Wash.2d at 195 (quoting Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981)). Allowing the jury to consider nonstatutory aggravating factors also defeats the constitutional mandate of channeled jury discretion. 98 Wn.2d at 195. In Bartholomew I, this court decided those dangers dictate that the court limit the evidence put before the jury. 98 Wn.2d at 196. Specifically, this court held:

> Information relating to defendant's criminal past should therefore be limited to his record of convictions.

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[16] I do not mean to imply nor do I believe there is anything improper with the manner in which the prosecutor gave her closing argument.

98 Wn.2d at 197. The evidence admitted in this case goes beyond the scope of Bartholomew I and does not properly rebut any mitigating evidence. In concluding the evidence was properly admitted, the majority ignores Bartholomew II's warning that

> [the court] do[es] not intend . . . that the prosecution be permitted to produce any evidence it cares to so long as it points to some element of rebuttal no matter how slight or incidental.

101 Wn.2d at 643 (quoting Bartholomew I, at 198). Any rebuttal value the challenged evidence has is certainly slight and incidental. Therefore introduction of that evidence was error, and we should vacate Lord's sentence and remand for a new sentencing proceeding untainted by the improperly admitted evidence.

In Bartholomew II, we deemed it necessary under both the Eighth Amendment of the Federal Constitution and art. 1, § 14 of this state's constitution to channel the jury's discretion at the sentencing phase of a capital case. In that case we recognized the importance of limiting the admission of non-statutory aggravating factors at the sentencing stage. But now the majority's approach in effect opens the door for non-statutory

aggravating factors during the sentencing phase. The majority's generous notion of what constitutes rebuttal evidence will allow prosecutors to get in just about any non-statutory aggravating factors during the sentencing phase, regardless of their reliability, on the pretext that it rebuts mitigating evidence. The majority also fails to take seriously the prejudicial effect of the testimony that was admitted in this case. Thus, the majority's approach will significantly undermine the court's efforts to channel jury discretion in the sentencing phase of capital cases. That approach is at odds with our holding in Bartholomew II, and infringes on the state and federal constitutional rights of capital defendants.

Our review of United States Supreme Court cases in Bartholomew II indicated that the strictures of the Eighth Amendment require that the jury's consideration of aggravating factors be limited at the sentencing stage of a capital case. Bartholomew II, 101 Wn.2d at 635-39. The Court has long allowed the defendant the opportunity to introduce any relevant mitigating factors. See California v. Brown, 479 U.S. 538, 541, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987); Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954, 2964

(1978). The Court, however, has taken a more stringent view of what kinds of aggravating evidence can be admitted. As the Court wrote in Gregg v. Georgia, 428 U.S. 153, 203-04, 49 L. Ed. 2d 859, 96 S. Ct. 2909, 2939 (1976):

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

(Italics ours.) See also California v. Ramos, 463 U.S. 992, 1009 n. 23, 77 L. Ed. 2d 1171, 1186, 103 S. Ct. 3446, 3457 (1983). Barefoot v. Estelle, 463 U.S. 880, 926, 77 L. Ed. 2d 1090, 1125 103 S. Ct. 3383, 3411 (1983); Zant v. Stephens, 462 U.S. 862, 886, 77 L. Ed. 2d 235, 256, 103 S. Ct. 2733, 2748 (1983). As the court in Bartholomew II noted, this "prejudice" concept subjects evidence submitted by the prosecution to a more rigorous standard than that advanced by the defendant at the sentencing phase of a capital trial. Bartholomew II, 101 Wn.2d at 637. The Bartholomew II court also noted that the provisions of article 1, sections 3 (due process) and 14 (cruel punishment)

of the Washington State Constitution limit the range of evidence a prosecutor may introduce. 101 Wn.2d at 639. Therefore, the majority's approach to the Bartholomew test infringes on the federal and state constitutional rights of capital defendants.

B: Cross examination of Lord's allocution statement

Prior to closing argument, Lord exercised his common law right to allocution. The purpose of allocution is to provide the defendant an opportunity to plead for leniency. See State v. Happy, 94 Wn.2d 791, 793, 620 P.2d 97 (1980); Marshall, Lights, Camera, Allocution: Contemporary Relevance or Director's Dream?, 62 Tul. L. Rev. 207, 211 (1987). Allocution assures the sentencer will consider the defendant's position on sentencing prior to pronouncing that sentence. State v. Peterson, 97 Wn.2d 864, 868, 651 P.2d 211 (1982).[17]

In this case, as the majority correctly points out, Lord went beyond the bounds of allocution. He engaged in more than just a plea for mercy. Nonetheless, the court still erred in allowing the State to cross-examine Lord.

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[17] The court in State v. Peterson, supra, interpreted the right of allocution under former CrR 7.1. Nonetheless, the court's reasoning applies equally to the common law right of allocution.

By definition, allocution is an exchange between the defendant and the sentencer. Allocution does not involve the prosecutor. Neither the majority nor the State cite any case that holds there is a right to cross-examine a defendant after allocution. Instead, each cites language in State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986), sentence vacated sub nom Mak v. Blodgett, 754 F. Supp. 1490 (W.D. Wash. 1991).

In Mak, the trial court rejected the defendant's request to make a statement to the jury following closing argument.[18] The language cited by the majority and the State merely holds a defendant may not make a statement to the jury after closing argument. Thus, Mak stands for the proposition the State must have an opportunity to rebut any statement the defendant makes. That rebuttal does not, however, have to take the form of cross examination. There is simply no language in Mak that says there is a right to cross-examine the defendant on his allocution statements.

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[18] The opinion in Mak does not specifically state that defendant's request was to make a statement after closing argument. Such a conclusion is inevitable, however, from the fact Mak refused an opportunity to make a statement "prior to closing arguments". 105 Wn.2d, at 729. Additionally, this court's observation that Mak's requested statement would be "unanswerable by argument", 105 Wn.2d, at 729, only makes sense if Mak's request was to make a statement after argument.

State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722, cert. denied 479 U.S. 922 (1986), illustrates the proper manner for dealing with a defendant's allocution. In Jeffries, the defendant did not testify during either the guilt or penalty phases of the trial. He did, however, exercise his right to allocution. In closing argument the prosecutor referred to defendant's allocution:

> Well, you have heard the Defendant in a situation where he does not have to take an oath and in a situation that I can't cross-examine him and his statement, I submit is one that is insulting to the intelligence.

105 Wn.2d, at 415. The prosecutor used the closing argument to rebut the allocution.[19] That is the proper way to address allocution.

The essence of the majority's argument is that the State must be allowed to cross-examine in order to rebut "testimony" offered by Lord during his allocution. Cross examination is not, however, necessary to rebut the allocution. Instead, the prosecutor could object that the statement is beyond the bounds of proper allocution. During closing argument the prosecutor may remind the jury of any properly introduced evidence that

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[19] I note that in Jeffries we did not comment on the prosecutor's assumption that he had no right to cross-examine after allocution.

rebuts the defendant's statements. The prosecutor may make reasonable inferences and argument related to the allocution. The prosecutor may also, as did the prosecutor in Jeffries, remind the jury that the defendant's statement is unsworn and not subject to cross examination. In that way, the prosecutor can sufficiently rebut any of the defendant's statements.

The rule the majority adopts is a trap for the unwary defendant. The majority places the burden solely on the defendant, and in so doing the majority fails to protect that defendant's rights. A better rule would be to require the prosecutor to object whenever he or she believes the defendant has gone beyond the proper bounds of allocution. That rule would protect both the State's and the defendant's interests. A proper objection would protect the State's interest in not having the defendant put unsworn testimony before the jury. It would also allow the court to protect the defendant's right to plead for mercy, by assuring the defendant does not go beyond the proper bounds of allocution.

The cross examination of Lord violated his right to due process, and his right to remain silent. Therefore, I would vacate the sentence on this ground as well.

C. Proportionality

The majority holds Lord's sentence is proportionate to the sentences imposed on defendants in similar cases. I have previously discussed the difficulties in conducting proportionality review under our state statute. See State v. Campbell, 103 Wn.2d 1, 42, 691 P.2d 929 (1984) (Utter, J., concurring in part/dissenting in part) cert. denied 471 U.S. 1094 (1985); State v. Jeffries, 105 Wn.2d 398, 435-37, 717 P.2d 722 (Jeffries I), cert. denied, 479 U.S. 922 (1986). The majority's attempt to clarify proportionality review does not eliminate the difficulty. I refer the court to my earlier opinions for further discussion of this issue.[20]

The majority correctly points out that proportionality review must include all cases where the defendant was convicted of aggravated murder, whether or not the State sought the death penalty. RCW 10.95.120, .130; majority opinion, at 104 n. 27. Our goal is to ascertain whether the "sentence of death is excessive or disproportionate to the penalty imposed in similar cases". RCW 10.95.130(2)(b). The sentence is excessive and

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[20] See also Comment, Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution, 64 Wash.L.Rev. 111, 121 (1989).

disproportionate if it has not "generally been imposed in similar cases". (Italics mine.) In re Jeffries, 114 Wn.2d 485, 490, 789 P.2d 731 (1990) (Jeffries II); State v. Rupe, 108 Wn.2d 734, 767, 743 P.2d 210 (1987), cert. denied 486 U.S. 1061 (1988). A sentence is not "generally" imposed unless it is imposed in at least 50 percent of the similar cases. Jeffries I, 105 Wn.2d, at 437 (Utter, J., dissenting).

The majority focuses on those cases in which the death penalty was actually imposed. It expends precious little ink in describing a few similar cases in which the death penalty was either not imposed or not sought by the prosecutor. It does not list all of the similar cases. When the majority does mention such cases, it does not describe the aggravating factors and mitigating factors in those cases. It does not describe the defendant's prior convictions in those cases. It superficially distinguishes those cases from this one without meaningfully comparing all of the relevant factors in those cases to the ones in this case. The majority then concludes that Lord's sentence is proportionate, because, in the majority's view, the death penalty has been imposed in similar cases.

This analysis ignores both the plain language of the statute and the basic purpose of proportionality review. Our statute requires us to consider all cases in which the defendant was found guilty of aggravated first degree murder, "regardless of whether [the death penalty] was imposed or executed". RCW 10.95.130(2)(b). Our task is not to determine whether the death penalty has ever been imposed in a similar case, but to determine whether it is generally imposed in similar cases.

To perform that task, we must compare the facts and circumstances of Lord's crime with those of all other similar aggravated first degree murder convictions. This comparison involves more than just a simple matching of aggravating factors. Jeffries II, 114 Wn.2d, at 490. Nonetheless, our cases make it clear that similarity in aggravating factors is an element of proportionality review. See e.g., Jeffries II, 114 Wn.2d, at 491.

Because we must compare aggravating factors, I am compelled to briefly address whether there is sufficient evidence to support the jury's determination that Lord committed the murder in the course or furtherance of the crime of kidnapping. The majority concludes that, because there is sufficient evidence

to support the finding of rape, it is unnecessary to address the sufficiency of the evidence of kidnapping. This conclusion is correct with regard to whether there is sufficient evidence to support the jury's verdict of guilt. With regard to proportionality review, however, it would be fundamentally unfair to use an aggravating factor in determining the universe of similar cases if there was insufficient evidence to support that factor. Because I believe there is insufficient evidence to support a finding of kidnapping, I would not consider that aggravating factor in selecting the universe of similar cases.

The test for determining whether there is sufficient evidence to justify a finding of guilt beyond a reasonable doubt is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In this case, there is insufficient evidence to meet the Green test.

The State's theory is that Lord lured Parker to Kirk Lord's workshop under the pretense of employing her to finish cabinets. The State argues that Lord "deceived" Parker into going to the workshop, and therefore kidnapped her by

deception. To support that theory the State presented evidence that Lord offered Parker a job in June 1986. The State also presented evidence that Lord frequently gave Parker rides home. Finally, the State presented evidence that Lord made two phone calls from the Frye residence on the day Parker disappeared. The State theorized those calls were to assure that no one was at the workshop, and that no one would be looking for Lord.

The record is insufficient to establish the State's speculative theory. The first of Lord's calls was placed to his girlfriend while Parker was almost a mile away from the Frye house. There is nothing to indicate Lord knew Parker was out riding her horse, or that she would be arriving at the Frye house in the near future. Thus there is nothing in the record to support the speculative theory that Lord placed the call to assure no one would be looking for him.

There is also nothing to support the speculation that Lord lured Parker to the workshop with a job offer. The original offer was made six months earlier, and there is no evidence to indicate Lord ever renewed the offer. Therefore, the State's evidence is insufficient to support the kidnapping charge.

Because there is insufficient evidence to support the finding that the murder was committed during the course or furtherance of kidnapping, we must disregard that finding. Therefore, we need only consider the following three aggravating factors: the murder was committed to conceal commission of a crime, to conceal the identity of the perpetrator of a crime, and in the course or furtherance of the crime of rape.

We must do more than just look at aggravating factors, however. We also must examine any relevant mitigating factors. Jeffries II, 114 Wn.2d, at 490. Lord put on mitigating evidence that he has an antisocial personality disorder, he has substance abuse problems with alcohol and marijuana, and his family loves him. He also presented evidence that he is a good carpenter.

In performing proportionality review, we must also take into consideration the defendant's criminal record. Lord has two prior convictions, including one for a second degree murder he committed when he was 14 years old.

A review of trial judge reports and published cases reveals twenty-four cases in which the defendant was convicted of aggravated murder with rape as an aggravating factor. Juries imposed death sentences in only three of those cases: Westley

Dodd (Clark County Cause Nos. 89-1-1133-6, 89-1-1134-4); Michael Furman (Kitsap County Cause No. 89-1-00304-8); and Lord. Because this court has yet to review either Dodd's or Furman's conviction and sentence, those cases have little value for proportionality review purposes. Nonetheless, it is worth noting that Dodd pleaded guilty to brutally raping and murdering three children. The facts of Dodd's convictions for three counts of aggravated murder do not seem similar to Lord's case.

Furman's case also seems dissimilar. The jury found five aggravating factors in Furman's case, as opposed to three in Lord's case. Three of the factors were the same in both cases, but the jury in Furman's case also found that he committed the crime in the course or furtherance of burglary and robbery. Furman also had more prior convictions than Lord, albeit mostly for property crimes.

In addition to Dodd, Furman, and Lord, there are six other rape/murder cases in which the jury found the existence of at least three aggravating factors. Of those six, we should consider five as being similar to Lord's case.

A jury convicted David Duhaime of premeditated murder in the first degree for raping and murdering a 17-year-

old girl. State v. Duhaime, 29 Wn. App. 842, 631 P.2d 964 (1981), rev. denied 97 Wn.2d 1009 (1982).[21] The jury also found Duhaime guilty of rape, kidnapping, and robbery, all in the first degree. Duhaime "brutally stabbed" his victim to death and left her body lying in the snow. There is no mention in the case of any mitigating factors. The jury did not impose the death penalty.

James Dykgraaf tied his victim up, raped her, strangled her, and shot her. Report of the Trial Judge, Clark County Cause No. 86-1-00111-5. The jury found four aggravating circumstances: the murder was committed to conceal the identity of the perpetrator, and the murder was committed in the course or furtherance of burglary, rape and robbery. Dykgraaf presented mitigating evidence that he has a "mixed personality disorder" and that his father was a "domineering" man who had raped Dykgraaf's sisters. Dykgraaf has one prior conviction for first degree assault with intent to rape. Thus, like Lord, Dykgraaf has a history of violence towards women. The jury did not impose the death penalty.

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[21] Because Duhaime's conviction occurred prior to May 14, 1981, the trial judge was not required to submit a report to this Court. See RCW 10.95.120.

Russell Stenger kidnapped a 23-year-old jogger. Report of the Trial Judge, Clark County Cause No. 87-1-00951-3. He took her to two different locations, and raped her repeatedly at each. Stenger then tied his victim to a tree and shot her. He has three prior felony convictions. The jury found three aggravating factors. There was no credible evidence of mitigating factors. The trial judge described the killing as "most heinous". The State did not seek the death penalty.

Ronald Thomas "hog-tied" his victim to her bed, raped her and strangled her. Report of Trial Judge, King County Cause No. 86-1-04723-5. The jury found three aggravating factors: the murder was committed to conceal the identity of the perpetrator and the murder was committed in the course or furtherance of rape and robbery. There was no credible evidence of mitigating factors. Thomas has three prior convictions, including one for armed robbery. The State did not seek the death penalty.

Daniel Yates raped and murdered a 13-year-old girl. Report of the Trial Judge, Kitsap County Cause No. 87-1-00444-7. The jury found Yates guilty of three counts of first degree rape and two counts of attempted first degree

murder. Yates has five priors, including one for armed robbery. The jury found the same three aggravating factors as in Lord's case, plus the additional factor that the murder was committed in the course or furtherance of kidnapping. There was no credible evidence of mitigating factors. The jury did not impose the death penalty.

The above cases have similar numbers and types of aggravating factors. Proportionality review requires that we do more than just match aggravating factors, however. In re Jeffries, 114 Wn.2d 485, 490, 789 P.2d 731 (1990) (Jeffries II). We must also examine the facts of the crime and the characteristics of the defendant. Thus there are several other cases that we should consider as being similar for purposes of proportionality review.

Bruce Bushey beat, raped, and strangled a woman he had met a few hours before the murder. Report of the Trial Judge, King County Cause No. 84-1-02746-7. His prior conviction for second degree rape establishes a pattern of violence against women. There was no credible evidence of mitigating factors. The jury did not impose the death penalty.

Kenneth Hovland "brutally" raped and sodomized a 16-year-old girl. Report of the Trial Judge, Snohomish County Cause No. 81-1-00678-1. He stabbed her repeatedly and suffocated her by forcing her face into mud. The jury found two aggravating factors: the murder was committed in the course or furtherance of rape and in the course or furtherance of kidnapping. Hovland has two prior convictions for non-violent offenses. There was no credible evidence of mitigating factors. The State did not seek the death penalty.

Michael Ihde raped and strangled a 67-year-old retired nurse. Report of the Trial Judge, Clark County Cause No. 87-1-00126-1. He raped her vaginally, orally, and anally. Ihde has four prior felony convictions, including one for rape and one for assault with intent to kill. The jury found two aggravating factors: the murder was committed in the course or furtherance of rape and in the course or furtherance of robbery. There was no credible evidence of mitigating factors. The State did not seek the death penalty.

Sherwood Knight raped and strangled his victim. Report of the Trial Judge, King County Cause No. 86-1-01678-0. The jury found the aggravating factors that the murder was

committed in the course or furtherance of rape and in the course or furtherance of robbery. Knight has six prior convictions, including three felonies. There was no credible evidence of mitigating circumstances. The State did not seek the death penalty.

A review of the cases indicates the death penalty is not generally imposed in cases similar to Lord's. There is no principled way to distinguish Lord's case from those cases in which the death penalty was not imposed. Therefore Lord's sentence is excessive and disproportionate. I would vacate that sentence.

Conclusion

The trial court erred both in admitting the summary chart and in sending the chart into the jury room. The chart inaccurately summarizes the evidence by converting the expert's speculative and inconclusive testimony into conclusory facts. In so doing the chart unfairly emphasizes the State's interpretation of that testimony and draws conclusions for the jury. Admission of the chart violated Lord's right to due process. Therefore, I would reverse the finding of guilt.

Even if the finding of guilt is not reversed, the errors in the sentencing phase require us to vacate the sentence. The trial court erred in allowing the State to elicit the facts underlying Lord's previous convictions. That evidence is prejudicial and does not properly rebut any mitigating evidence offered by Lord. The trial court also erred in allowing the prosecutor to cross-examine Lord after Lord exercised his right to allocution. Allocution is not subject to cross examination. Instead, the prosecutor should have objected to any alleged violation of the limits of allocution. Absent such objection, the prosecutor cannot complain that Lord exceeded the proper bounds of allocution.

Finally, I dissent because Lord's sentence of death is disproportionate to the sentences imposed on other defendants who committed similar crimes. A sentence of death is disproportionate unless it is generally imposed in similar cases. To be generally imposed, a sentence must be imposed in at least 50 percent of the cases. My analysis reveals nine rape/murder cases that are similar to Lord's case. None of the defendants in those nine other cases was sentenced to death, despite the fact that in eight of those cases the trial judge determined there was

no credible mitigating evidence. Therefore, I would vacate Lord's sentence as being disproportionate.

/s/Utter, J.

/s/I concur. Smith, J.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

| | | |
|---|---|---|
| BRIAN KEITH LORD,<br><br>Petitioner,<br><br>vs.<br><br>TANA WOOD, et al.,<br><br>Respondents. | ) | Case C94-464R |

EVIDENTIARY HEARING - VOLUME II

on May 20, 1997, before the Honorable Barbara Jacobs Rothstein, United States District Judge, at the United States Courthouse, Seattle, Washington.

Appearances of Counsel:

On Behalf of Petitioner: PETER CAMIEL
SHERYL GORDON McCLOUD
Attorneys at Law

On Behalf of Defendant: PAUL WEISSER
JOHN SAMSON
DONNA MULLEN
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Sue Palmerton
Official Court Reporter
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to wait until after the State has rested. So, it was something we preferred not to do, but we kind of were between a rock and a hard spot, so to speak.

Q. Mr. Ness, you're a trial lawyer?

A. Yes.

Q. How long have you -- and you're a criminal defense lawyer?

A. Yes.

Q. How long have you been doing that?

A. Since 1973.

Q. Do you know about how many felony cases you've tried?

A. See, '74 that's 23 years. Probably at least 200.

Q. Misdemeanor trials?

A. Too many. Have no idea.

Q. You're experienced?

A. Yes.

Q. Have you made many good decisions in many of your cases?

A. I like to think so, yeah. But looking back on everything, sometimes you're not so sure, but.

Q. Have you ever made a mistake in any of your cases?

A. I'm sure I have.

Q. I'm going to turn to a different subject. In the midst of all the forensic evidence that you were receiving, do you recall receiving reports from the police that three young men had spotted Tracy Parker alive on September 17th, 1986?

A. Well, I got those reports as soon as I got into the case.



That wasn't anything new or unexpected.

Q. Were they -- where did you get them from?

A. Just part of the discovery.

Q. Did you also get former counsel Mr. Yelish's file?

A. Yes.

Q. Do you recall these reports that I'm talking about?

A. I don't recall the reports. I recall the circumstances.

Q. What do you recall about them?

A. That three people or three young men had indicated that they'd seen Ms. Parker the day after the State alleged that the homicide occurred.

Q. Were those statements consistent with your defense of the case?

A. As far as whether or not Mr. Lord had committed the crime, they were consistent with that, yeah.

Q. Well, what was your defense in the case?

A. Our defense was that he hadn't committed the crime.

Q. And did these -- were these statements supportive of that defense?

A. I'm not real sure what you mean, "supportive of that defense." In terms of whether or not they were beneficial, our decision was that they probably were not.

Q. Is it true that the State's theory of the case is that the only time that Brian Lord could have committed the murder of Tracy Parker was during a short space of time on the evening of [II-216] September 16, 1986?

A. I don't recall. There was an issue regarding time and things like that, but I don't recall exactly if that was their theory or not. I think so.

Q. Well, without asking about the specific date, do you recall that the State's theory was that it occurred on a specific date?

A. Right. Their theory was that it occurred, I believe, the 17th of September.

Q. Do you recall that there were statements from at least these three boys saying that Ms. Tracy Parker was seen alive the day after the State argued the homicide occurred?

A. I recall that these three young men indicated they thought they had seen her the day after, yes.

Q. So, that is consistent with the defense that Mr. Lord did not commit the homicide?

A. Well, depends on how you look at, what you mean by "consistent."

Q. Tell me.

A. I mean, our decision was that their observations, based on our investigation, probably were not helpful to what our defense was. Taking into consideration everything.

Q. And in what way were they not helpful?

A. We did not believe that they were accurate. And we were concerned about our credibility with the jury in presenting testimony that may not have been beneficial.

Ness - Direct

[II-217]

Q. Looking back on it now, would you agree that that probably was not a good decision?

MR. WEISSER: Objection. Calls for speculation.

THE COURT: Sustained.

Q. (By Ms. McCloud) Is there any way that the statements of those three boys undermined your principal theory, which is that -- which, as I understand it, was that Brian didn't do it?

A. When you say "undermined," as I've indicated, we didn't feel that they were going to be beneficial and may have affected what we thought would be our credibility to the jury.

Q. Let me ask you about some things that occurred or didn't occur during the penalty phase of the trial. Did you talk with Mr. Lord's family about testifying in the penalty phase?

A. Yes.

Q. And what were the circumstances of that? Was that up here?

A. No. That was -- well, I had talked to them down there in California and then when they came here after the guilt phase.

Q. When you travel -- you traveled down to California?

A. Yes.



[II-226]

THE COURT: Why don't you just give it the next number in order at the break. Any objection?

MR. WEISSER: We'd have no objection, Your Honor.

THE COURT: Be admitted.

(Exhibit 51 admitted in evidence.)

MS. McCLOUD: Nothing further.

THE COURT: Your timing is impeccable, counsel, because it's a good time for our morning recess. Give you a change before cross-examination. You may step down, but watch your step. There are two steps there. Court will be in recess for 15 minutes.

(Morning recess.)

CROSS-EXAMINATION

BY MR. WEISSER:

Q. Good morning, Mr. Ness.

A. Good morning.

Q. Mr. Ness, in the course of working on the Brian Keith Lord case, did you and/or Ms. Mandel develop a theory of the defense for the guilt phase of the trial?

A. Well, our theory of the defense was that he was not the perpetrator.





Q. Was it also to attack the forensic evidence?

A. Yes.

Q. And to show that Mr. Lord had no contact with the victim?

A. That's what we had hoped to show, yes.

Q. Prior to Mr. Lord's trial, had you ever participated in the defense of a capital trial?

A. Yes.

Q. Do you know how many cases you had?

A. I had one prior capital trial.

Q. What year was that?

A. 1980.

Q. Do you remember the name of the case?

A. Yes. State v. Cupic, C-U-P-I-C.

Q. And what was the result of that trial, if you recall?

A. He plead guilty right before final argument, because I think it was State v. Martin allowed guilty pleas to avoid the penalty, death penalty.

Q. Have you had any other cases other than Mr. Lord's and I believe, as you said, Mr. Cupic's case where the State was seeking the death penalty?

A. Prior to Mr. Lord's or subsequent?

Q. Or subsequent.

A. Yes.

Q. And what was that case?

A. State v. Yates.

Ness – Cross

[II-228]

Q. And do you recall what year that was?

A. Well, this was '87. So, it would have been '90, I believe.

Q. And the result in that case?

A. He was found guilty of aggravated murder and not given the death penalty.

Q. In your career, your legal career -- and I believe you said you were admitted to the bar in 1973?

A. Yes.

Q. In your legal career, how many murder cases have you defended?

A. Depends on what degree you're talking about. If you're talking about death penalty, it's the three I've talked about. If you're talking about aggravated murder trials, it's been, I believe, six or seven aggravated murder trials. Other murder trials, at least 10, if not more.

Q. Had you ever worked with Ms. Mandel before on a case?

A. Before the -- the Lord case?

Q. Prior to the Lord case, yes.

A. We worked in the Kitsap County public defender's office together for three or four years. So, yes.

Q. Did you have occasion to work with her on a murder case prior to the Lord case?

A. I don't believe so. I don't recall.

Q. Have you ever served as a board member for any defense organizations?



[II-229]

A. Yes. On Washington Association of Criminal Defense Lawyers.

Q. Are you on the board currently or is this a past post?

A. No. This is past.

Q. Now, in developing the case strategy in Mr. Lord's case, did you and Ms. Mandel come up with a division of labor of sorts?

A. Of sorts. We prefer in our handling of these type of cases to both know what the other is doing and be prepared to handle everything, so. But we would divide up witnesses or areas to focus on, yes.

Q. To the best of your recollection, what were those -- did those areas fall into --

A. I think that I focused on the penalty phase, Ms. Mandel to some degree the guilt phrase. And then we divided up the forensic testimony to some degree. I remember that I cross-examined John Brown, so.

Q. Was Ms. Mandel primarily responsible for Donald Phillips as a witness?

A. Yes, she was.

Q: Now, prior to Mr. Phillips testifying at trial, you were aware that there was an internal affairs investigation involving him, are you not?

A. Yes.

Q. I'm sorry, were you not. And you were aware at that time, at that time he testified at trial, that he had lied in his official report. Is that correct?





kidnapping or exactly what it was. I don't remember what it was termed. That was all down in California.

Q. Now, you were asked earlier about three persons who gave reports to the police about Tracy Parker being alive on September 17th, 1986.

A. Right.

Q. That was Huff, Holden and Ayers, those names?

A. I don't recall the names.

Q. Did your investigator, Mr. Zornes, speak to those three people?

A. Yes, he did.

Q. Did Mr. Zornes give you a report of any sort about his interviews?

A. Yes, he did.

Q. Do you recall what -- first of all, was it written or was it an oral report?

A. It was a written report.

Q. And what, basically, was the gist of that report?

A. If I recall, the gist was that the three individuals were not very positive in either identification or timing.

Q. Had there been reports of others who had allegedly seen Tracy Parker after the 16th of September?

A. I think there was. I don't recall for sure. Under the circumstances here because she had disappeared and I don't believe her body had been found for a week, there were all types [II-235] of reports regarding possible sightings, I guess.

Q. And did you and Ms. Mandel discuss whether to call any or all three of these witnesses?

A. Yes, we did.

Q. Did Ms. Mandel concur with you?

A. Yes.

Q. And the reason you did not call these witnesses?

A. As I indicated on direct, we felt that it would affect our credibility with the jury because of the nature of what we had discovered in terms of their interviews with our investigator and, I believe, with the police.

Q. Now, at the conclusion of the guilt phase of the trial, you presented the closing argument for the defense, did you not?

A. Yes, I did.

Q. You were not present, though, during Mr. Clem's rebuttal argument?

THE COURT: Wait. Before you leave the three --

MR. WEISSER: Yes, Your Honor.

THE COURT: -- witnesses. What was it about their anticipated testimony that made you think it would

damage the defense credibility? Was it what Zornes, something Zornes said?

MS. McCLOUD: I'm sorry, Your Honor. I'm having a little difficulty hearing.

THE COURT: I asked him what was it about the possible testimony that made him think it would be damaging to the defense [II-236] case.

A. That they were not positive that the -- that, like I said, the identification and/or the timing was not real strong. And there was such a -- if I recall, such a large amount of evidence indicating the last time she'd been seen was on the 16th, I believe, or 17th.

[II-306]

Q. And you've worked with Mr. Ness in the past, correct?

A. Yes.

Q. You're his associate?

A. Yes.

Q. Do you consider him to be a competent attorney?

A. Yes.

Q. Have you ever worked with Mr. Ness where he provided incompetent representation?

A. No.

Q. In the Lord case during the guilt phase, did you consider whether there was possible mental defenses you could bring during the guilt phase?



[II-307]

A. We considered everything.

Q. You considered all possible defenses?

A. Yes.

Q. Including possible alibi defenses?

A. Yes.

Q. As to the three gentlemen that you talked about on your direct, now these are the gentlemen who claimed to have seen Tracy Parker alive on September 17th, 1986. Do you remember the decision that you made on that, as to whether or not to call these individuals?

A. You you mean do I remember the conversation and how we arrived at the decision or do I remember that a decision was made?

Q. Do you remember that a decision was made?

A. Yes.

Q. And that decision was made not to put them on the stand because you had a concern with attorney credibility?

A. We didn't -- we had concerns about their credibility and therefore about our credibility.

Q. And your concerns were based on statements they had made after the original statement?

A. Our investigator had outlined or, as I recall, made sort of a chart. I don't know that it referred to the three people you're even talking about. But it had interviewed -- this interview, what day they said they saw Tracy Parker and time when -- some of them were nonspecific.

[II-308]

They all fell into the category of -- and they had been recontacted. They all fell into the category of testimony that we, we decided we did not want to present.

Q. So, you had your investigators recontact these individuals before you decided not to call them?

A. Yes.

Monday,
January 19, 1987 - HUFF, ROBERT JR.
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206/871-7044 (mother)
206/697-3807 (father)

(1640) - Telephone contact was established with Robert Huff, Jr. at the residence of his mother. He recalled the day that he saw Tracy Parker walking alongside the highway. However, he could not recall the exact date of the sighting, nor the day of the week. He said that the report that he gave to the police would have been the most accurate, since it was fairly recent in relation to when he had seen her. The only available report is that from Deputy LEWIS whose contact was brief enough that she only wrote seven lines of a report. At the time she took the report, which was September 21, 1986 (five days after Tracy was last seen by anybody else), he told Lewis that it was Wednesday that he had seen her.

Huff, Jr., said that he and some friends, PAUL HOLDEN and GREG AYERS, had gone clam digging that day on the "Keyport Beach" at or near the Virginia Point residence of BRANDON ROWE (sp). Rowe is now in the US Army and

away from home. They returned via SR #308, westbound, and were nearly at the intersection with Viking Way at the traffic lights when they observed Tracy. Huff, Jr., said that he was seated in the right front passenger seat, Holden was driving and Ayers was in the back seat. She was walking alone on the north shoulder of the highway. It was Huff, Jr., who brought everybody's attention to Tracy. He described her as looking "pretty bummed out." Huff, Jr., said that he thought that she was attired in blue jeans and a flannel shirt, which he thought might have been red and blue checked. He said also that she looked at the car as it went past. He has known her for three to four years and was absolutely certain that it was Tracy and not SHANNON or ORLOB.

He was not able to reference the date any better than previously, saying that he would have to stand by his earlier statement to the police in which he said that he observed her on Wednesday. In relation to that day, though, he said that the preceding day only he and Holden had gone clam digging and on the day that he saw Tracy, he, Holden and Ayers were together. After seeing Tracy, he and Holden went to Hadlock,

where they sold the clams to Long Line Fish. This business is operated by FRANK DAVIS and ROD CLARK (sp), who pay them under the table, hence, no dated, written receipt. He further stated that they had sold clams to this business on the order of 40 to 50 times throughout the summer. He also remembered that they had played blackjack at the Holden residence that evening, which was nothing extraordinary.

Huff, Jr., said that he was telephoned by his father a day or two later, or possibly even the day that they had seen her, to ask if he had any knowledge of her whereabouts. He was certain that his father had called no later than three days later. Then he said that he thought that the day he had seen her was the day following his father's telephone call.

* Robert Huff, Jr. is enlisting in the US Navy in April, 1987.

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CONFIDENTIAL MEMORANDUM

TO: Mark Yelish

FROM: Scott O'Neal

RE: Brian Lord, telephone interview with Paul Holden, 13765 Crestview Drive, Silverdale, (phone number 779-7980), on 10-10-86

DATE: October 13, 1986

Paul indicated that he and his two friends, Bob Huff and Greg Airs, saw a girl whom they believed to be Tracy Parker on Wednesday, the day after her disappearance between the hours of 5:30 p.m., and 6:00 p.m. Paul indicated that he could not testify that he was 100% factually certain that it was Tracy as he only had a five second glance at the girl. He indicated that the girl looked like Tracy Parker to him as well as Bob Huff and Greg Airs. The three of them agreed that it was Tracy Parker.

He indicated that Bob was riding in the passenger seat and Greg was seated in the backseat of the vehicle. Paul was the driver. Paul indicates that he is familiar with Shannon Parker, Tracy's sister. He is certain that the girl that they saw was not Shannon Parker. He indicated that at the time that they

observed Tracy Parker walking down the street he was not aware of the fact that she was missing.

The last time that Paul saw Tracy was before the summer months and during the school year at North Kitsap High School. Paul graduated from North Kitsap last year. Paul indicated that he would frequently see Tracy in the halls of the school. He had no dates with Tracy and never went to her house. He indicated that she lived in the same general area as does he and he would occasionally see her in the area. He has never seen Tracy riding her horse. He believed that she was dressed in a plaid shirt (color unknown) and blue jeans. They were on their way to his house at the time that they saw Tracy. He indicated that he remembered playing poker that night with Greg and Bob. He indicated that he was certain that the day of the week was Wednesday because Greg was in the car. Greg was not with him on Tuesday. Greg Airs' phone number is 779-7231. Bob Huff's number is 697-3807.

According to Paul, none of the boys were drinking that day and none had been smoking any pot on that day. They had spent the day clam digging on Virginia Point Road. He indicated that he did not notice Tracy wearing a hat and could not tell me what type of shoes she was wearing.

Paul works at the Denny's restaurant on Kitsap Way in Bremerton.

SO:slm

Tuesday,
January 6, 1987 -

HOLDEN, PAUL JOSEPH
Age 19; dob 12-13-67
13765 Crestview Drive
Silverday, WA.
206/779-7980

AYERS, GREG
Age 18; dob 02-04-68
2133 Norrland Court
Poulsbo, WA.
206/779-7231

(1437) - Personal contact was established with both Holden and Ayers at the Ayers residence in Poulsbo and they were interviewed together. Essentially, their report that they had seen Tracy Parker on September 17th remained unchanged. However, when pressed about the exact day they would at times waver. Holden said that he and ROBERT HUFF, JR. had gone clam digging on either Monday or Tuesday of the week beginning September 15, 1986, and that Greg Ayers joined them on the second day, which would have been either Tuesday or Wednesday.

As they were returning from the BRANDON ROWE (sp) residence on Virginia Point Road where they were clamming, they observed Tracy walking west on SR #308 just east of the intersection with Viking Way (this location is reported in error by O'Neal in his interviews with Ayers and Huff). Holden said that he was driving his automobile, with Huff in the front

passenger seat and Ayers seated in the right rear. Holden, who has known Tracy for about five years (although not personally) and rides the same bus as she, stated that he did not get a good look at Parker, who was on the north shoulder of the highway facing them as they passed her. Ayers, who has known her for a couple of years, said that he had a good look at her. They put the time at after 1730.

We tried to time reference the incident but about all that they could come up with was that they thought that they were told by Huff's father about Tracy's disappearance the next day, which they said was Thursday. Otherwise, their activities were not unusual. The evening they saw Tracy, they went to Holden's and played blackjack. Holden and Ayers both said that their parents would not be helpful in this respect.

Ayers is scheduled for induction into the US Army on January 7th and will be departing for eight weeks of training at Fort Leonard Wood, Missouri, on January 8th. Following that, he goes to Fort Lee, Virginia, for five weeks of additional training.

Supreme Court, U.S.
FILED
JAN 27 2000
CLERK

JC

# ORIGINAL

(3)

NO 99-1087

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

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JOHN LAMBERT, Superintendent,
Washington State Penitentiary,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

---

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

---

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

31 pp

## QUESTION PRESENTED

Did the Ninth Circuit's conclusion that trial counsel were ineffective in failing to investigate and present three independent eyewitnesses, who have consistently stated for the last fourteen years that they saw the victim alive the day after she was supposedly killed, where the date and time of death were critical to the state's primarily circumstantial evidence case, contradict the pre-existing Supreme Court case of Strickland v. Washington, 466 U.S. 668 (1984), or other pre-AEDPA law?

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## STATEMENT OF THE CASE

*Procedural Background.* Mr. Lord was charged with felony murder and aggravated first degree murder. He was convicted as charged, after more than two months of trial; the jury returned "yes" verdicts to three of five charged aggravating factors. After a short penalty phase, the jury sentenced Lord to death.

The Washington Supreme Court affirmed, 6 to 3. Then-Chief Judge Dore's dissenting opinion states that in Lord's case, "For the first time in the ten years I have been on the Supreme Court I now dissent on a capital punishment case... because I feel the defendant did not have a fair trial." App. 275a-276a.

Following denial of state post-conviction relief, and before enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Mr. Lord's first and only habeas petition was timely filed. The district court granted an evidentiary hearing on claims concerning the credentials and credibility of state criminalist-witness Don Phillips; on the Washington State Patrol Internal Affairs investigation of Phillips' conduct on Lord's case; on ineffective assistance of counsel issues; and on problems with the testimony of two jailhouse informants. That court issued the writ in part, because of a penalty phase error. The state appealed the issuance of the writ on the penalty phase issue; Mr. Lord cross-appealed the denial of the writ on guilt phase issues, including the ineffective assistance of counsel issue before this Court.

The Ninth Circuit reversed the denial of the writ as to the guilt phase and dismissed the state's appeal of the grant of the writ on a penalty phase issue as moot. The state's petition for rehearing was denied; its suggestion for rehearing en banc was denied with no judge requesting a vote on the en banc call. App. 32a.

*Factual Overview.* The state's Petition introduces the factual background of this case by referring to portions of the state Supreme Court's view of the evidence. That court's decision on direct appeal, however, was based on incomplete data. The state at that time had still failed to disclose exculpatory information bearing on the veracity and reliability of the state's key forensic scientist, Don Phillips, who testified that he identified blood on the hammer that the state presented as the murder weapon and in the garage-workshop that the state identified as the murder scene -- information which was contained within the State Patrol's Internal Affairs files, some of which was personally known by the Prosecutor who tried this case. That information was located by post-conviction counsel and presented at the evidentiary hearing in district court. The district court was therefore able to present a more complete picture of facts relevant to the crime, the investigation, and the scientific evidence presented at trial.

The district court summarized Phillips' role in applying leuco-malachite green as a presumptive test for blood at the suspected crime scene in the Kirk Lord workshop on September 29, 1986, and in concluding that a hammer in that workshop and an area

on the floor of that workshop tested positive for blood. It then explained the Internal Affairs investigation concerning Phillips' test, only the barest outlines of which were discovered by the defense on their own, mid-trial; we highlight the portion that remained unknown to trial counsel at all times:

> At the evidentiary hearing before this court, *Sweeney testified that Phillips told him three different versions of how he had tested the hammer, all of them false.*

Order, P. 6, n. 3; CR:438 (App 39a).

> After talking with [criminalist] Nolan on October 23, 1986 and being informed that Nolan had conducted an exhaustive second examination of the hammer, [supervisor] *Sweeney himself examined the hammer for any indication of bodily fluids. He found none. He also asked another criminalist in the office, Chesterene Cwiklik, to examine the hammer for evidence of leuco-malachite green. Her examination revealed no proof of its presence on the hammer.*
>
> On November 3, 1986, Phillips submitted a written report .... This report was false in that it indicated he had used the drop method of testing the hammer rather than the spray method. Upon Sweeney's discovery that the report was false, an internal investigation of Phillips ensued which was conducted by the WSP Internal Affairs Section. Phillips resigned from his position effective December 26, 1986.
>
> Defense counsel only became aware of the internal investigation after Phillips' deposition when one of the Kitsap County detectives working on the case commented in a casual conversation with defense counsel in the hallway outside the courtroom that he had been interviewed during the investigation. On June 1, 1986, defense counsel brought the issue before the court and asked for discovery. The prosecutor denied having any reports or discoverable information on the subject.

* * *

> ... In an effort to speed the process, the trial judge agreed to act as an intermediary by contacting the attorney for the WSP and asking for the release of any relevant documents regarding the internal investigation of Phillips. On June 4, 1986, she indicated to counsel that she had received several documents, had reviewed them in camera and would release them to counsel ....
>
> ... *The judge indicated to defense counsel and they accepted her assurance that they had received all relevant documents.*
>
> *In fact, not all of the available, relevant information associated with the internal investigation was provided to defense counsel. An inquiry several years later by Lord's current counsel ... revealed several reports and other documents directly pertaining to Phillips credibility and qualifications as a criminalist as well as findings about the lack of trace evidence on the hammer which were not disclosed to defense counsel at trial.*

App 40a-43a.

Other information not before the state Supreme Court was the exculpatory testimony of the three young men *who stated then, and continue to state now*, that they saw the victim alive the day *after* Lord was supposed to have killed her. Given the narrow time period during which the murder could have been accomplished by Lord at the identified crime scene -- less than an hour on the evening of September 16, 1986, while the victim was unaccounted for and before the Kirk Lord family returned from out of state -- a 24-hour change in the time of death was critical, exculpatory information.

**REASONS WHY THE PETITION SHOULD BE DENIED**

Respondents respectfully request that this Court deny the petition for writ of certiorari. Section 1. There is no conflict between Lord and Strickland; both acknowledge the fact-bound nature of the ineffective assistance inquiry, the inappropriateness of per

se rules of attorney conduct, the need for investigation before strategic decisionmaking and the importance of evaluating the totality of the circumstances. Section 1. There is no conflict between the decision below and the other Circuit Courts' Strickland decisions, either; none of them endorse a per se rule of reversal for counsel's failure to interview particular witnesses and none of them endorse a per se rule of affirmance where counsel has interviewed a witness. Section 2. Further, the impact of the opinion below is quite limited because it was a fact-bound decision in a pre-AEDPA case. Section 3. Finally, petitioners misstate certain facts relevant to this Court's exercise of certiorari jurisdiction. Section 4.

1. *There is no conflict between Lord and Strickland; both acknowledge the fact-bound nature of the ineffective assistance inquiry, the inappropriateness of per se rules of attorney conduct, the need for investigation before strategic decisionmaking and the importance of evaluating the totality of the circumstances.*

The state says the Ninth Circuit's Lord decision is based on an erroneous per se rule requiring relief whenever defense counsel fail to interview certain witnesses. Its petition calls for certiorari because, it claims, the Ninth Circuit's purported categorical decision was wrong; in fact, the state continues, Strickland categorically precludes relief where defense trial counsel fail to interview alibi witnesses whose testimony is consistent with the defense theory and inconsistent with the state's theory, and then fails to call them at trial.

The petition's characterizations of the Lord holding and the Strickland holding are both wrong. The Lord case established no new rule *requiring* a finding of deficient performance when trial counsel fail to interview certain witnesses personally; it explicitly rejected such a categorical rule.[1] The Lord case established no new rule detracting from the strategic nature of the decision to call a witness or not; it explicitly acknowledged the "professional judgment" involved in such a decision.[2]

---

[1]The Ninth Circuit's statement about whether it was creating a categorical rule or not stated, in full:

> Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively .... However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor -- factors we are not in a position to second-guess.

App. 27a, n. 8.

[2]The Ninth Circuit's full statement on this point is:

> We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in person. Few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing he tell his story.

App. 27a.

On the other hand, Strickland adopted no categorical rule precluding a finding of deficient performance where attorneys fail to interview and call particular witnesses. Strickland started from the premise that the more investigation a trial lawyer does before making a strategic choice, the more deference trial counsel's strategic choice deserves. The Ninth Circuit said exactly the same thing, even quoting Strickland.[3] The notion that fuller attorney investigation, including interviews, can lead to a more informed determination about witness credibility, stated in Lord, is thus simply a subset of the general Strickland rule that fuller investigation can lead to more informed strategic decisions of all sorts.

So who is endorsing the creation of categorical, per se, rules in the ineffective assistance area? Not the Ninth Circuit. It began with a detailed analysis of the strengths and weaknesses of the state's largely circumstantial evidence case, App. 9a-13a; it continued with a review of the theory of the defense case and an analysis of whether the alibi eyewitnesses supported or undermined that case, App. 13a-14a; it then went into a detailed description of every statement that the three neutral alibi eyewitnesses ever gave to law enforcement or defense investigators, pointing out the consistency of the young men's descriptions of the subject, time and date of the sightings, and the minor inconsistencies which

---

[3]As the Ninth Circuit in Lord explicitly stated, citing Strickland: "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable, professional judgments support the limitations on investigation."

tended to show that there had been no collusion in the stories, App. 14a-22a; it canvassed the record of trial counsel's testimony for any valid reason for failing to interview or call these witnesses and found that defense counsel conceded that the witnesses supported the defense theory, acknowledged that the witnesses contradicted the state's case in a critical respect, had no belief that the witnesses were biased, and made the decision not to call them based solely on *a credibility determination that no one who ever spoke directly to the witnesses ever made.*[4] App. 22a-24a. The Ninth Circuit made a contextual holding, not a categorical holding, that given these circumstances, trial counsel's performance was deficient. It is the state that is essentially seeking a departure from such a detailed, contextual, fact-specific analysis, by claiming that it is *always* permissible for trial counsel to avoid personal interviews with potential witnesses.

Further, the Ninth Circuit explicitly stated that it was *not* creating any rule that counsel must personally interview any, or all, or even specific, types of witnesses; it simply reiterated the axiom endorsed by Strickland that the more thorough the investigation, the more deference to strategic decisions of counsel

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[4]While the investigators' reports pointed out minor discrepancies in the witnesses' descriptions, neither the law enforcement reports nor the defense investigator reports ever gave any conclusion or any basis for a conclusion that the boys were lying, drunk, high, biased, or in any other way unable to perceive or relate accurately. The only ones in this case to make any adverse credibility determination about the boys were the people who never met them.

is warranted, and the less thorough the investigation, the less deference to strategic decisions of counsel is warranted:

> Counsel is not obligated to interview every witness personally in order to be adjudged to have performed effectively.... However, where (as here) a lawyer does not put a witness on the stand, his decision will be entitled to less deference than if he interviews the witness. The reason for this is simple: A lawyer who interviews the witness can rely on his assessment of their articulateness and demeanor -- factors we are not in a position to second-guess.

App. 27a.

The state also contends that the Ninth Circuit failed to apply Strickland's "reasonable probability" of a different outcome standard in evaluating whether trial counsel's deficient performance caused prejudice. The state contends that the Ninth Circuit found that a mere possibility of a different outcome sufficed. Petition, p. 17.

The state is splitting hairs. When it came to characterizing how much, and how persuasive, the omitted testimony would have been, the Ninth Circuit stated in the words of Strickland that it would have been enough not just for the possibility of a different outcome, but to "undermine confidence in the outcome."[5] This "undermine confidence in the outcome" standard is taken verbatim

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[5]The Ninth Circuit's complete holding on this point is:

> We cannot say that the government's case was so strong that the testimony of these three witnesses could not have raised a reasonable doubt in the minds of the jurors. Rather, we find the possibility that their testimony would have led to Lord's acquittal to be "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

App. 28a.

from Strickland, 466 U.S. at 694. The possibility or "probability" standard is taken from Strickland, also, which held that even a "more likely than not altered the outcome" standard was too *high* a burden for defendants to shoulder in this context. Id., 466 U.S. at 693. Strickland explicitly defines the sort of "probability" that counts as a "probability sufficient to undermine confidence in the outcome," id. at 694, and that is precisely the standard and the language used in Lord.

Further, the state faults the Ninth Circuit for applying the burden of proof adopted in O'Neal v. McAninch, 513 U.S. 432, 445 (1995), to this Strickland claim, arguing that this relieved Lord of the burden of proving prejudice. Petition, pp. 17-18.[6] Actually, the Ninth Circuit ruled that the error was prejudicial under both standards, so its use of two prejudice hurdles, O'Neal and Strickland, rather than one, was not relieving Mr. Lord of proving anything. Further, after Strickland prejudice is found, there is no additional finding of prejudice required to prove a Strickland claim on habeas: Strickland itself was a habeas case,

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[6]The Ninth Circuit's full statement on this point is:

> ... If Holden, Huff and Ayres had testified, the State might still have won a conviction by exploiting the inconsistencies in their accounts or convincing the jury that it was Tracy's sister they saw that day. That, however, would be a very different case. As it is, we find ourselves "in grave doubt as to the harmlessness of an error that affects substantial rights," and must conclude that counsel's omission of this evidence prejudiced Lord's defense. O'Neal v. McAninch, 513 U.S. 432 (1995).

App. 28a.

and Strickland held that its performance and prejudice tests sufficed, without further proof of harm. Id., 466 U.S. at 697-98. Thus, no additional prejudice inquiry -- such as that mandated by Brecht v. Abrahamson, 507 U.S. 619 (1993) -- is undertaken in a Strickland habeas case. O'Neal v. McAninch, cited by the Ninth Circuit, involves the application of Brecht in a particular context. There was no need to apply Brecht's prejudice standard to Lord's habeas claim at all, though, since Strickland's prejudice standard was satisfied[7]; hence there was no need to apply O'Neal's development of Brecht's prejudice standard, either. Thus, if the Ninth Circuit made any error, it was in forcing Lord to prove too much prejudice, under Brecht (O'Neal) as well as Strickland, rather than too little.

2. *There is no conflict between the decision below and other Circuit Courts' Strickland decisions; none of them endorse a per se rule of reversal for counsel's failure to interview witnesses and none of them endorse a per se rule of affirmance where counsel has interviewed a witness.*

As discussed above, the state's characterization of the Ninth Circuit's decision as one based on a new rule requiring defense trial counsel to interview personally all witnesses, or certain witnesses, or particular categories of witnesses, is wrong. Yet the state depends on this error; that is the only way that the state can manufacture the purported conflict between the holding in

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[7]See Kyles v. Whitley, 514 U.S. 419, 436 & n.9 (1995); Hill v. Lockhart, 28 F.3d 832, 839 (8th Cir. 1994), cert. denied, 513 U.S. 1102 (1995).

Mr. Lord's case and the sister circuit decisions rejecting per se rules regarding ineffective assistance.

Thus, the petition argues that Lord conflicts with Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999), which supposedly rejected "a per se rule that required an attorney to personally interview potential defense witnesses." Petition, p. 11. Actually, no party advanced such a per se rule in the Eleventh Circuit case; it is a routine holding the counsel was not deficient for failing to interview a death-sentenced defendant's father for possible mitigation evidence, were the defendant had had almost no contact with the father and there was no other indication that he could supply any useful information. In Lord, of course, the witnesses provided the complete defense of alibi, and prior interview reports clearly highlighted their importance. Thus, Williams v. Head is completely consistent with Lord.

The petition then implies that Lord conflicts with the Seventh, Eighth and Eleventh Circuits, because they "agree the decision not to call a witness is the epitome of a strategic decision that the courts will seldom second guess." Petition, p. 10, n.3. In support of this assertion, the petition first cites Waters v. Thomas, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc) (1995). This case, like Lord, viewed the totality of the circumstances. Then it addressed whether counsel's failure to re-call witnesses with information about the death-sentenced defendant's mental illness in the penalty phase, when such evidence had already been presented at the guilt phase, was error. The fact

that trial counsel was not ineffective in not re-calling these witnesses, after having fully investigated, prepared, and presented their testimony at trial, does not conflict with Lord -- because in Lord, trial counsel never did any such presentation of the necessary witness testimony.

The petition next cites Walls v. Bowersox, 151 F.3d 827, 834 (8th Cir. 1998), cert. denied, 119 S.Ct. 1468 (1999), in support of the claim that Lord conflicts with the sister circuits' holdings granting complete deference to counsel's decision not to call witnesses. That case held that trial counsel's failure to call family members to present mitigation evidence at the penalty phase did not amount to ineffective assistance, since "the defense team made an extensive effort to investigate Walls' family background and to secure the family's testimony at trial," id. at 833-34, the efforts were made by not just a social worker *but also by the trial lawyers*, id. & n.4, but "the family steadfastly refused to testify." No such extensive investigation, including investigation by counsel, complete with attempts to secure testimony, occurred with the Lord alibi witnesses. Thus, Walls v. Bowersox is also consistent with Lord.

United States v. Weaver, 882 F.2d 1128, 1139 (7th Cir.), cert. denied, 493 U.S. 968 (1989), also cited by the state for the notion that no Strickland claim can ever lie for failure to call witnesses, dealt with trial counsel's failure to call witnesses. But there was no allegation in Weaver that trial counsel failed to interview the witnesses. Instead, trial counsel learned that the

witnesses might be helpful in providing impeachment evidence but would hurt by undermining the key defense of coercion. In Lord, in contrast, defense counsel admitted that the alibi witnesses' testimony *supported* the defense theory, contradicted the state's theory, and opened the door to nothing damaging. App. 22a, 24a. Thus, only the facts of Lord and Weaver differ -- not the holdings.

The final case cited by the state in support of its claim that Lord conflicts with the other circuits in its treatment of trial counsel's decision not to call witnesses is Lewis v. Lane, 832 F.2d 1446, 1447 (7th Cir. 1987), cert. denied, 488 U.S. 829 (1988). It is true that the court in Lewis v. Lane found no ineffectiveness where trial counsel failed to call "alibi" witnesses. But there was no problem with investigation there: the witnesses were "present at trial"; the trial *attorneys* made several attempts to interview them personally pre-trial; after the witnesses failed to appear for appointments they retained *another lawyer who successfully obtained personal interviews*; and that *lawyer* told trial counsel "that it was her opinion that the witnesses were not credible and that they would lie on the stand..." Id. In Lord, in contrast, no attorney ever even tried to interview the witnesses; no attorney made a professional conclusion about witness credibility based on personal contact; the witnesses never avoided or missed appointments; and no investigator, defense or police, who had personal contact with the alibi witnesses, ever said that they were lying, unbelievable, or biased. Thus, there is no conflict between Lewis v. Lane and Lord, either. If there had been attorney

interviews of the alibi witnesses in Lord; if there had been attorney conclusions that the alibi witnesses lacked credibility and would exude bias in Lord; if there and been support at any level for a finding that the neutral, independent, eyewitnesses in Lord who had given their immediate sightings to law enforcement and defense alike were unbelievable or biased; then this would be a very different case.

The petition then claims that Lord conflicts with the Eleventh Circuit's deference to trial counsel's decision to refrain from investigating, in an apparent attempt to convince this Court that all limits on investigation are defensible under Strickland. Petition, p. 11. Strickland, however, explicitly recognized the duty to investigate. Id., 466 U.S. 668, 689-90.

The petition further implies that Lord conflicts with the Third Circuit, which has a rule of deference to trial counsel's decisions about whether to interview witnesses personally and whether to call them to testify. Petition, p. 11 (citing Lewis v. Mazurkiewicz, 915 F.2d 106, 113 (3rd Cir. 1990)). Lewis v. Mazurkiewicz, however, involved trial counsel's decision not to interview a self-defense witness because, based on the defendant's description of the events, the deadly force the defendant used, and the conflicts between the physical evidence and the uncalled witness' proposed testimony, no self-defense theory could succeed. In fact, the Third Circuit in Lewis v. Mazurkiewicz distinguished between cases in which the proposed witness testimony, as outlined to trial counsel, provides little support for a possible defense

and cases (like Lord) in which proposed witness testimony would support a viable defense completely consistent with the defense theory. It held that Lewis v. Mazurkiewicz fell into the first category, because the absent witness' testimony did not support a self-defense theory. The Third Circuit explicitly noted, however, that it *had granted relief under Strickland in a case that fell into the second category*, i.e., where "defense counsel made no effort to locate or interview witnesses who could have supported a potentially effective defense [self-defense] that was unsuccessfully advanced at trial." Id. at 114. The Lord case also falls into that second category. The Lord decision is completely consistent with the Third Circuit's case-by-case approach to whether counsel's failure to interview witnesses rises to the level of ineffective assistance.

The petition then contends that Lord conflicts with the holding of Ray v. Rose, 535 F.2d 966, 975 (6th Cir.), cert. denied, 429 U.S. 1026 (1976), that there is no right to independent investigation by trial counsel; trial counsel can rely on the prior *attorney's* work. Indeed, this pre-Strickland case did so hold. But the prior attorney in Lord had not yet interviewed the alibi witnesses before he had to withdraw, in the pre-trial process, due to a conflict. Thus, his limited work at the charging stages of this lengthy case and his lack of contact with the alibi witnesses provided an incomplete basis for later trial counsel to make such a trial strategy decision.

The petition further argues that several circuits follow the rule that "[o]nly rarely" does counsel's failure to interview potential witnesses arise to the level of ineffective assistance. The cases (half of which pre-date Strickland) are more accurately described as endorsing a case-by-case approach to whether trial counsel's decision to decline to interview witnesses, given proper deference, will constitute deficient performance.[8] Still, either characterization underscores the fact that there are those cases -- like Lord -- where failure to interview particular witnesses will constitute deficient performance. The decisions cited by the Petition in support of this point thus endorse the Lord case-by-case approach, rather than contradicting it.

None of the cases contained in the state's petition establish a per se rule precluding relief for ineffective assistance based on

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[8]The petition generally cites, in support of this notion, Plant v. Wurick, 636 F.2d 188, 189 (8th Cir. 1980); Wing v. Sargent, 940 F.2d 1189, 1190 (8th Cir. 1991); Thomas v. Wyrick, 535 F.2d 407, 413 n.7 (8th Cir.), cert. denied, 429 U.S. 868 (1976); Sanders v. Trickey, 875 F.2d 205 (8th Cir.), cert. denied, 493 U.S. 898 (1989). In Sanders v. Trickey, the trial lawyer *did* interview the witness who was not called to testify. It then cites and distinguishes three Eighth Circuit cases in which *failure to interview witnesses was found to constitute deficient performance.* Plant v. Wyrick, though declining to find deficient performance on the facts before it, explicitly cited three prior circuit decisions in which the same court *had* found ineffective assistance of counsel due to failure to interview witnesses. In Wing v. Sargent, the trial lawyer decided to call two witnesses, whom he never interviewed, who supposedly would have said the defendant did not do the crime. But trial counsel's decision was reasonable because those witness' testimony, even if credible, would have thwarted his trial strategy, alerting the judge to the need for an instruction that he did not want given. In Lord, of course, the witnesses' testimony, if believed, would have only bolstered the defense theory of the case. And Thomas v. Wyrick actually held that counsel's failure to interview witnesses did constitute ineffective assistance!

failure to investigate, interview and call particular witnesses.[9] Nor does Lord. None of these cases establish a per se rule compelling relief for ineffective assistance based on failure to investigate and call particular witnesses. Nor does Lord. The point emphasized by all these cases, and Lord, is context.

In fact, decisions of the sister circuits affirmatively *support* the notion that a decision not to call an exculpatory witness that is based even in part on the witness' purported lack of credibility is entitled to less deference where trial counsel never got to evaluate that witness' credibility with an interview.[10] Similarly, decisions of the sister circuits *agree* that the failure to call critical alibi witnesses (like those in Lord), or eyewitnesses (like those in Lord), or witnesses necessary to prove an important fact bearing on guilt or innocence (like those in Lord) will be scrutinized more closely -- and performance

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[9]Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir.), cert. denied, 525 U.S. 981 (1998), is the other decision cited for this point in the cert. petition. Huffington found no error in the failure to investigate *peripheral* witnesses. In the course of this holding, it explicitly cited *nine* decisions from several circuits finding deficient attorney performance for failure to interview alibi witnesses, or eyewitnesses, or witnesses critical to the issue of guilt or innocence. Lord's alibi eyewitnesses clearly fall into these latter categories.

[10]Chambers v. Armontrout, 907 F.2d 825, 828-30 (8th Cir.), cert. denied, 498 U.S. 950 (1990) (failure to interview or call self-defense witnesses deprived defendant of effective assistance); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986) (failure to investigate and interview available alibi witnesses constituted ineffective trial preparation).

will be found deficient -- where trial counsel fails to interview such witnesses.[11]

3. *The impact of the opinion below is quite limited, because it was a fact-bound decision in a pre-AEDPA case.*

Mr. Lord's first and only petition was filed in district court before the enactment of the AEDPA. The AEDPA's new limitations on the substantive claims that might be asserted on habeas and the deference that must be given to state court decisions are therefore inapplicable here. The impact of the Ninth Circuit's pre-AEDPA Lord decision on future cases is therefore quite limited.

In addition, the claim on which the Ninth Circuit granted relief arose under Strickland. As the decisions cited in the preceding section show, Strickland decisions are especially fact-dependent. The Ninth Circuit's factually unique application of Strickland will thus have limited impact, also.

4. *Petitioners misstate certain facts relevant to this Court's exercise of certiorari jurisdiction.*

*No Irrefutable Scientific Evidence of Guilt.* The state's petition implies that Mr. Lord's guilt is indisputable because of irrefutable scientific evidence.[12] The state is apparently trying

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[11]E.g., Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (alibi witnesses); Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (alibi witnesses); Chambers v. Armontrout, 907 F.2d 825, 829-32 (self-defense witness); Lawrence v. Armontrout, 900 F.2d 127, 129-30 (8th Cir. 1990) (alibi witnesses); Blackburn v. Foltz, 828 F.2d 1177, 1182-83 (6th Cir. 1987), cert. denied, 485 U.S. 970 (1988) (alibi witness); Code v. Montgomery, 799 F.2d 1481 (alibi witness); Nealy v. Cabana, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (alibi witness).

[12]Petition, p. 2 ("The prosecution presented extensive scientific evidence tying Lord to the murder, including over 100 pieces of trace evidence.").

to convince this Court that the Ninth Circuit's decision was contrary to Strickland because guilt was so certain that any error was harmless.

The state neglects to mention that the validity of the key components of the trace evidence was undermined both during and after the trial by: (1) criminalist Phillips' lies about his tests, his credentials, and the results of his chemical tests at the crime scene; (2) evidence presented at trial contradicting and ultimately causing the state's expert to correct her testimony about whether a hair on a blanket associated with the victim matched one of Lord's hairs; and (3) the fact that no one ever testified that the trace evidence found at the body site "matched" trace evidence found at the purported crime scene, only that such evidence might have a common source. The state's implication that any error was harmless so relief was contrary to Strickland is therefore in error.

The state concludes its summary of the purportedly scientific evidence by stating that "post-trial DNA testing by defense experts was not exculpatory." Petition, p. 3. Critically, however, it was not inculpatory, either; it was inconclusive. Again, the state's attempt to invoke this Court's certiorari jurisdiction by implying that the Ninth Circuit reversed in a case where there is no question about factual guilt is unsupported.

*No Detailed Confession to the Murder.* The state then refers to "Lord's detailed confession to the murder," Petition, p. 3, in another apparent effort to convince this Court that any trial

errors were harmless. But this too is misleading: Mr. Lord clearly and consistently denied participation in the murder every time he was asked about it by law enforcement, in court, in post-trial depositions, and in any other memorialized setting. The only two people who ever claimed that Lord "confessed" to them were jailhouse informants, presented by the state at trial, with opportunity and motives to lie[13]; their statements about Lord's

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[13]One jailhouse informant was Sonny Belgard. Mary Belgard, his former wife, testified that he had a deal with the prosecutor; Sonny Belgard testified only that he could not remember. Mary Belgard testified that after Sonny was released from jail before the Lord trial, "He said that he had made a deal with the prosecutors.— But I don't know what the deal was. He never said." III-529. Mary Belgard specifically said his "deal" was with prosecutor Danny Clem. Id. Mary received death threats about testifying about her husband's deal. III-540. Sonny testified: "I can't honestly answer [whether there was a deal] that because I don't really think I did. But I don't - I can't remember." III-432. Evidence was also introduced showing that after Sonny was released from jail prior to testifying in the Lord case, he was arrested but never prosecuted for being a felon in possession of a firearm. III-429. His release came earlier than his wife expected it, and she knew quite a bit about the system. III-534. Further, Sonny was on parole when he was in jail for a new charge of burglary, but it was never revoked despite the parole officer's revocation recommendation. III-417, 531. (The district court declined to characterize this arrangement as an undisclosed deal, however. App. 73a.)

The other jailhouse informant was Rex Harvey. He testified at the evidentiary hearing that he was approached by jailer Captain Bertholf and told that he was to be Lord's personal trustee. IV-590. Harvey testified that he was told he should report back anything Lord said about his case. IV-593. Harvey testified that while he was still an inmate, he had meetings with the Prosecutor. IV-597. During these meetings, Harvey would be asked if Lord made statements about his case. IV-598. During the meetings, Harvey was told to continue to report any statements Lord made. IV-599. It was Harvey's understanding the jail wanted Lord to talk about his case. IV-612. It was Harvey's belief that the more information he could get, the better in terms of what the jail staff thought. IV-612. (Harvey declined to characterize this as a deal with the state, though, so the district court found that there was no undisclosed exculpatory evidence in this arrangement. App.

purported confessions were never detailed,[14] but contained only material that was available to the entire population of this rural community because of extensive pre-trial publicity.[15] Thus, any implication that trial errors were harmless (and hence that the case is more worthy of this Court's review) is improper.

*No Clouds on Witnesses' Veracity or Unbiased Status.* The state then tries to undermine the testimony of the uncalled witnesses, apparently in an attempt to convince this Court that the Ninth Circuit departed from Strickland in ruling that such testimony might have been outcome-determinative; it asserts:

> The fact the teenagers did not see Tracy's family and the scores of volunteers searching for her on Wednesday suggests that, if the sighting occurred at all, it occurred on Tuesday. Even if the sighting did occur on Wednesday, the boys might have seen Tracy's sister, Shannon Parker, who resembled Tracy and who had been searching the area on the date of the alleged sighting.

Petition, p. 5, n. 2.

The facts do not support these criticisms of the young men's testimony. The three young men knew Tracy Parker and went to

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60a).

[14]As the Ninth Circuit stated in full on this point, "Harvey claimed that Lord told him the following: 'I asked her to go cruising around with me at the house I was remodeling, that's where she kept her horse. I hit her in the head with a hammer, raped her in the back of my truck, threw her in a ditch.' According to Harvey, Lord also said he 'got blood on a U-Haul blanket.' Belgard recounted a similar confession with the added detail that Lord had wrapped Tracy's body in a blanket and threw it in the back of the truck before dumping it later on." App. 12a.

[15]Indeed, there was so much pre-trial publicity that a change of venue was granted; the jury was bussed in from out of county. Mr. Lord, however, remained incarcerated at the Kitsap County Jail, at the heart of the newspaper and television broadcasts covering his trial.

school with her. They were available to testify at trial that they saw Parker as they drove in a car together on September 17, 1986. The three witnesses, Robert Huff, Jr., Paul Holden and Gregg Ayres, were first contacted by police just one day later, on Thursday, September 18, 1986 when Parker was considered a missing person -- so the state's effort to convince this Court that the sighting might have been off by a day or two is contradicted by the fact that the boys gave this information to the police within the first 24 hours of Ms. Parker's disappearance.

The state's attempts to characterize the boys' testimony as contradictory and unbelievable is also factually unsupported. Huff told the police in that first report that he saw Parker walking eastbound on Highway 308 towards Keyport from Viking Way on Wednesday (September 17, 1986 was a Wednesday). He identified the clothing she wore and said "he was positive it was Tracy as he saw her full face as they drove by." Ayres was interviewed by police and told them he knew Parker by sight and name. He saw her walking toward Keyport from Viking Way on Wednesday. Holden was interviewed on September 21, 1986. He also stated that he had seen Parker on September 17, 1986. The police report indicates: "I asked him if he was sure on that date and time and he said yes, he was positive."

Each man testified at the evidentiary hearing. Holden strongly endorsed the accuracy of his previous report and his

familiarity with the victim.[16] Ayres did the same. He strongly confirmed his earlier report of seeing Tracy Parker on September 17, 1986.[17] Huff, the third man who saw Tracy Parker on September 17, 1986, also strongly confirmed the date of his previous sighting. Even at the evidentiary hearing in 1997, Huff had no doubt that the girl he saw on September 17, 1986 was Tracy Parker.

Defense investigator Scott O'Neil testified that in 1986, he worked for the law firm that first represented Lord. I-156. He confirmed interviewing Ayres, Holden and Huff in 1986, and giving summaries to former defense counsel.[18]

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[16]Holden, employed at the Puget Sound Naval Shipyard at the time of the habeas evidentiary hearing, was 19 years old in September, 1986, and knew Tracy Parker by sight. He had grown up near her and rode the school bus with her. I-134. He was familiar enough with Tracy and her older sister, Shannon, that he could definitely tell them apart. I-134. In September, 1986, after he learned that Tracy Parker was missing, he contacted the police and reported having seen her on an intersection of Viking Way and Keyport. Holden was with Huff and Ayres. I-136. He was confident that the person he saw was Tracy Parker. I-136. He is also confident that the date he told the police officer at the time was accurate. I-136-37.

[17]He was 29 at the time of the evidentiary hearing and employed as a police officer for the Department of Defense. I-146. In 1986, he was 18 years old. He knew Tracy because she attended the same school as he. I-146. He was also in the same grade. I-147. In September of 1986, he learned that she was missing. I-148. When he heard this, he recalled that he had just seen her on Wednesday, September 17, 1986 at the intersection between Keyport and Bangor. I-149. He spoke with a police officer and reported his sighting of Tracy. Id. He had no uncertainty about the fact that it was Tracy he had seen and no uncertainty about the date he told the police officer. I-150.

[18]In O'Neil's report regarding the interview of Ayres, O'Neil reported there was no drinking or pot smoking by any of the boys on the day they saw Tracy. I-161.

Finally, the suggestion that the boys confused Tracy with her sister Shannon lacks factual support. As the Ninth Circuit indicated, at the time of their initial, pre-trial interviews by both the police and the defense investigators, the boys confirmed that they knew Tracy, knew Shannon, knew the difference between the two, and knew that the person they saw was Tracy. App. 18a-19a. Further, Shannon Parker testified at trial that she was not at that location around that time.

*Absolutely No Credibility Determination Made by District Court.* Finally, the state attempts to characterize the district court's decision as a credibility determination adverse to the three witnesses, who testified at the habeas evidentiary hearing.[19] Actually, the trial court never made any finding that those witnesses lacked credibility. Its rejection of the ineffectiveness claim was, instead, based on what defense trial counsel *might have believed*: "Defense counsel reasonably *could have found* sufficient discrepancy among the witnesses' various accounts, sufficient uncertainty in their memories and sufficient question about the accuracy of their identification as well as the date on which the event happened to decide not to call them ...." App. 88a-89a

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[19]The petition contends, "the Ninth Circuit gave no deference to the conclusion of the district court judge who actually looked these witnesses in the eye and heard them testify at the evidentiary hearing. In doing so, the Ninth Circuit ignored the district court's implicit findings that the teenagers were not credible." Petition, p. 18, n.7.

(emphasis added).[20] Thus, the district court did not reject the three boys' testimony as lacking in credibility; it speculated about what defense counsel "could have found," and such speculation is not a credibility finding or entitled to deference.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[20]In fact, the district court's decision about what defense counsel "could have" believed was not the reason trial counsel gave: Lord's trial attorney, Ness, acknowledged in his evidentiary hearing testimony that the Huff, Holden and Ayres statements were *consistent* with the defense presented in the case. II-215. He testified, instead, "we did not believe they were accurate. And we were concerned about our credibility with the jury in presenting testimony that might not have been beneficial." II-216.

(4)

99-1087

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

JOHN LAMBERT, SUPERINTENDENT,
WASHINGTON STATE PENITENTIARY,

Petitioner,

v.

BRIAN KEITH LORD,

Respondent.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## I. INTRODUCTION

The Ninth Circuit held an attorney's judgment on the selection of witnesses is entitled to "less deference" where the attorney relies on interviews conducted by an experienced defense investigator rather than personally interviewing the witnesses. In opposition to the petition, Lord argues this "less deference" standard is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984) and the other circuit courts' application of *Strickland* because the amount of deference accorded to counsel's decision should be based on the amount of investigation personally conducted by counsel. Because Lord's brief points out the very conflict created by the Ninth Circuit's decision, the Court should grant the petition for a writ of certiorari.[1]

## II. ARGUMENT

### A. *Strickland* Did Not Establish a Sliding Scale of Deference for Reviewing Counsel's Decisions.

The Ninth Circuit stated it would have deferred to counsel's decision not to the call the three teenagers as witnesses if counsel had personally interviewed the youths. *Lord v. Wood*, 184 F.3d 1083, 1095 & n. 8 (9th Cir. 1999). Because counsel did not look the witnesses in the eye, however, the Ninth Circuit believed counsel's decision is entitled to less deference. *Id.*

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[1] Lord spends several pages alleging that the state withheld exculpatory evidence, that the state's scientific evidence was faulty, and that the informants testified about Lord's confession in exchange for undisclosed deals. The district court rejected each of these claims following an evidentiary hearing. *See* App. 48a-49 (finding undisclosed information was not material); App. 49a-51a (rejecting challenge to admissibility of state's scientific evidence); and App. 59a-61a and 73a-74a (rejecting claims regarding informants' testimony).

Lord defends the Ninth Circuit's decision by contending that "*Strickland* started from the premise that the more investigation a trial lawyer does before making a strategic choice, the more deference trial counsel's strategic choice deserves." Opposition to Petition for Writ of Certiorari, at 7. Lord argues "the less thorough the investigation, the less deference to strategic decisions of counsel is warranted." *Id.* at 9. However, *Strickland* did not establish a sliding scale of deference for reviewing counsel's decisions.

In reviewing a claim of ineffective assistance, the federal courts must always start with a strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. This presumption applies to decisions made following a complete investigation, to decisions made to limit an investigation, and even to decisions not to conduct a particular investigation. *Id.* Contrary to Lord's argument, this Court has never applied a "sliding scale of deference" in reviewing counsel's decisions.

Lord's assertion that the amount of deference applied depends upon the investigation conducted directly conflicts with *Strickland*'s declaration that all decisions of counsel, even decisions not to investigate, must receive a heavy measure of deference. As this Court stated:

> In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, ***applying a heavy measure of deference to counsel's judgment.***

*Strickland*, 466 U.S. at 690 (emphasis added).

In any ineffective assistance case, no matter the factual circumstances, the federal courts must begin their review by presuming counsel rendered adequate assistance. The federal courts must apply a heavy measure of deference to all of counsel's judgments, regardless of the amount of investigation actually conducted. *Strickland*, 466 U.S. at 690. By applying "less deference" to counsel's decision not to call the teenagers as witnesses, simply because counsel did not conduct a face-to-face meeting with the boys, the Ninth Circuit applied a standard in direct conflict with the standard established in *Strickland*.

Attempting to distinguish *Lewis v. Mazurkiewicz*, 915 F.2d 106 (3rd Cir. 1990), Lord characterizes the actions of his attorneys as a complete failure to investigate the three boys. However, counsel did in fact investigate the teenagers. After reviewing the police reports of the boys' statements and the interview reports prepared by the first defense investigator, counsel assigned an experienced investigator to contact and re-interview the boys. Lord's counsel made a conscious decision to have the investigator contact the boys rather than spending the valuable resources required for the attorneys to conduct a personal interview. The investigator talked with the boys and reported back to counsel. After conferring with the investigator, counsel decided not to call the boys as witnesses. Counsel did investigate the teenagers and the proposed testimony.

The only step allegedly lacking in the investigation was a personal, face-to-face meeting between the attorneys and the boys. This Court has never required that counsel conduct such meetings, however, and Lord fails to show how such a meeting would have altered counsel's decision making process in this case. The boys were not angelic witnesses who would have swayed counsel with charisma. As the evidentiary hearing revealed, there were sufficient deficiencies with the teenagers' proposed testimony that counsel could have reasonably decided

not to call the teenagers as witnesses.[2] Counsel decided that evidence of an alleged sighting of Tracy the day after she disappeared was not the type of evidence counsel wished to present at trial. App. 342a ("They all fell into the category of testimony that we, we decided we did not want to present."). A face-to-face meeting would not have altered this decision.

Attempting to distinguish *Lewis v. Lane*, 832 F.2d 1446, (7th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988), Lord essentially argues an interview conducted by another attorney carries more weight than an interview conducted by an experienced defense investigator. Opposition to Petition for Writ of Certiorari, at 14-15. There is no evidence that attorneys are better judges of credibility than lay people. Consequently, the courts should grant the same amount of deference to counsel's judgment not to call a witness based upon a third party interview, whether the interview had been conducted by an experienced investigator or another attorney. If the courts apply less deference to counsel's decision simply because counsel did not personally look the witness "in the eye", this "less deference" standard must apply both where the witness is interviewed by another attorney (as in *Lewis v. Lane*) and where the witness is interviewed by an experienced defense investigator (as in *Lord*). Because *Lord* applies "less deference" where counsel does not personally interview a witness, but *Lewis* does not, *Lord* conflicts with *Lewis*.

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[2] Lord argues the district court merely speculated about what counsel "could have found". Opposition to Petition for Writ of Certiorari, at 25-26. The district court, however, never stated its ruling was the product of speculation. Rather, the district court clearly stated that "[h]aving carefully reviewed all of the documentary evidence submitted on this claim and having heard the testimony of the three witnesses as well as the opinion of Lord's expert witness, the court concludes that the decision not to call them was a reasonable strategic choice which did not amount to ineffective assistance of counsel." App. 88a.

Lord also attempts to distinguish *Walls v. Bowersox*, 151 F.3d 827 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 1468 (1999), by arguing the efforts to contact witnesses in *Walls* were made not just by subordinates "but also by the trial lawyers". Opposition to Petition for Writ of Certiorari, at 13. Lord again suggests that interviews by attorneys are somehow categorically superior to interviews conducted by experienced investigators. In making this argument, however, Lord ignores the Eighth Circuit's ruling that counsel acts properly by delegating investigative work to subordinates. *Id.* at 834 n. 4; *see also United States v. Weaver*, 882 F.2d 1128, 1138 (7th Cir.), *cert. denied*, 493 U.S. 968 (1989) (counsel may properly seek the aid of investigators for preparation and investigation). Lord's argument, and the Ninth Circuit's holding, that counsel's judgment is entitled to less deference, simply because an investigator rather than counsel interviewed the potential witnesses, directly conflicts with *Walls*.

Although Lord attempts to distinguish *Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999), it is clear *Williams* concerned a claim of ineffectiveness based on the alleged failure to personally interview and call witnesses. Unlike the Ninth Circuit, the Eleventh Circuit held counsel's decisions to limit an investigation is accorded a strong presumption of reasonableness, and a decision not to investigate must be reviewed applying a heavy measure of deference. *Williams*, 185 F.3d at 1236-37.

Finally, Lord fails to show that *Strickland* is premised on a sliding scale of deference. In *Strickland*, defense counsel conducted a considerably less than thorough investigation. Counsel spoke to the defendant and to the defendant's wife and mother. *Strickland*, 466 U.S. at 672-73. Counsel did not follow up on the one unsuccessful effort to meet with the defendant's family, did not request a psychiatric examination, and did not look further for evidence concerning the defendant's character and emotional state. *Id.* at 673. The Court did not apply "less deference" to counsel's judgments even though counsel did not conduct a complete and thorough investigation.

Although Lord attempts to distinguish the cases cited by Petitioner, the fact remains that this Court and the other circuit courts have consistently applied a heavy measure of deference to all of counsel's decisions, including decisions based on a less than thorough investigation. Because it applies a "less deference" standard, the Ninth Circuit's holding conflicts with *Strickland* and the other circuit court cases applying *Strickland*.[3]

## B. The Ninth Circuit Relieved Lord of His Burden of Proving Prejudice Under *Strickland*.

The Ninth Circuit found "the ***possibility*** that [the teenagers'] testimony would have led to Lord's acquittal to be 'sufficient to undermine confidence in the outcome.'" *Lord*, 184 F.3d at 1085-96 (emphasis added). Citing to *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Ninth Circuit held that, because it was in grave doubt as to harmlessness of an error, it must conclude counsel's omission prejudiced Lord's defense. *Lord*, 184 F.3d at 1096. Lord argues the Ninth Circuit required Lord to meet too harsh a standard because it required Lord to show both a reasonable probability of prejudice and a lack of harmless error in order to obtain relief. In fact, the Ninth Circuit combined the two standards to alleviate Lord's burden of proof.

Lord first argues the Petitioner is "splitting hairs". Opposition to Petition for Writ of Certiorari, at 9-10. Lord asserts that the possibility the evidence could affect the verdict is the equivalent of a reasonable probability sufficient to undermine confidence in the outcome. However, "the mere possibility of a

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[3] Lord suggests there is no need to resolve the conflict created by the Ninth Circuit's opinion because this is a pre-AEDPA case. Because Ninth Circuit continues to apply its prior precedent in reviewing AEDPA cases, *see Duhaime v. Ducharme*, No. 98-36073 (9th Cir. January 10, 2000) (WESTLAW 2000 WL 12056), the Ninth Circuit will continue to apply the *Lord* decision in future cases.

different outcome is not sufficient to prevail on the prejudice prong." *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. ), *cert. denied*, 120 S. Ct. 369 (1999). Rather, there must be a reasonable probability of a different outcome. "[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Because the teenagers' testimony would not have put the whole case in a different light, Lord fails to show prejudice.

Lord next mistakenly asserts that the Ninth Circuit required him to prove both prejudice and a lack of harmless error. In *O'Neal*, the Court considered the unusual circumstance where the "record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *O'Neal*, 513 U.S. at 435. The Court defined "grave doubt" to mean "that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* In such a situation, the judge should treat the error as if it were not harmless. *Id.* Thus, *O'Neal* concerned how, after the petitioner had proven an error exists, the court should review the error to determine if it affected the judgment. *O'Neal*, 513 U.S. at 436. The federal courts apply this standard to determine if an error is harmless, not to determine the preliminary question of whether an error in fact occurred.

By citing to *O'Neal*, the Ninth Circuit clearly indicated it was in "grave doubt" as to whether counsel's alleged deficiencies prejudiced Lord's defense. Because of this doubt, Lord obviously did not carry his burden of proof under the second prong of *Strickland*. Because the Ninth Circuit mistakenly applied the *O'Neal* standard in determining the second prong of *Strickland*, however, the court erroneously believed it must assume prejudice occurred. The court therefore relieved Lord of his burden of satisfying the prejudice prong of *Strickland*.

## III. CONCLUSION

For the reasons stated herein and in the petition for a writ of certiorari, the petition should be granted.

RESPECTFULLY SUBMITTED

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